IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 97-03522-CA

DIVISION: CV-H

ANGELA B. WIDDICK, as Personal Representative of the Estate of ROLAND E. MADDOX, deceased,

Plaintiff,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION, a foreign corporation; LIGGETT GROUP, INC., a foreign corporation; and WINN-DIXIE STORES, INC., a Florida corporation,

Defendants.

PROCEEDINGS held before The Honorable Charles O. Mitchell, Jr., at the Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, on Tuesday, June 2, 1998.

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P R O C E E D I N G S

June 2, 1998 8:00 a.m.

THE BAILIFF: This court is now in

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session. Please be seated.

THE COURT: Good morning. Are you ready to proceed, Mr. Wilner?

MR. WILNER: Yes, Your Honor.

MR. RILEY: Your Honor, can we be heard at side bar before we start.

THE COURT: All right.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Judge, I'm going to request the Court to instruct Mr. Wilner not to use the commentary or the opinions prepared by C. D. in the notes throughout the remainder of his examination of Dr. Tulchin.

I have no objection, Your Honor, to Mr. Wilner asking Dr. Tulchin about any of the articles that are cited or any of the digests of those articles. I do, however, object to examination of Dr. Tulchin with respect to C. D.'s commentaries and editorial comments that are contained in the digest and summaries.

The reason for that, Your Honor, is I

believe that they are not part of the witness's testimony. He has not relied upon them in forming his opinion. He has relied on the articles and then on the factual digest contained in the summaries. He has not relied on the editorial comments.

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The editorial comments are purely that, they are opinions expressed by a student with no training in history or in historical research, and for that reason, Your Honor, they constitute hearsay, and for that reason, I believe it would be improper to examine the witness with respect to those editorial comments in the cross-examination.

MR. WILNER: From his own people he said that he relied on them.

THE COURT: Oh, no, he said he didn't rely on them, Mr. Wilner. I mean, he said he did not agree with those comments and he didn't rely on them.

MR. WILNER: After he was -- they were stuck in his face. Before, before they were stuck in his face he said, oh, yes. He said sure.

THE COURT: You know, maybe I heard differently, and if you want to see if you can lay the foundation, I would allow you to do it, but so far I have heard from him he relied on his people to

summarize the articles. And you said, well, what is his comment so, you know, it's in effect it's her comment, and I didn't rely on it.

MR. WILNER: His choosing at this point what he wants to rely on or not after the evidence is in front of him --

THE COURT: What do you mean at this point? Anybody ever asked him that before? If you

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want to -- no, if you want to impeach him with his deposition where he said he relied on that on the editorial comments of his people, I'll be happy to allow that, but I mean --

MR. WILNER: The point is whether he says that he relied on it or not is not the issue before us today. If it was available to him and he chose to close his eyes to it, then that's equally valid on cross-examination. You can't --

THE COURT: He didn't close his eyes to it. He read it and did not agree with it.

MR. WILNER: So I think that the jury is entitled to see what he chose not to agree with if it's in his own notes. This is the material that he gave to us, his own notes. I don't see how he can separate himself from --

MR. RILEY: It's just an --

MR. WILNER: Let me point out something else. There are no -- let me show you this...

(Counsel displays document for the Judge)

MR. WILNER: Excuse me, I have got to put this down. Although he said at one time that he relied on the articles themselves, we don't have those. The only thing we have, which he said he relied on also, are these (indicating). And these are done by C. D. Now --

MR. RILEY: This is her commentary, Your

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Honor.

MR. WILNER: Whether it is her commentary or not, the whole thing is done by her. This whole thing is C. D.'s writing, so we can't -- what she saw --

THE COURT: Do you want to call her to testify?

MR. WILNER: No. But this is what he relied on. Now, if he says, well, I want to rely on one piece of it, but not the other, that is up to the jury to decide.

MR. MATTHEWS: Judge, this is not somebody that we made up.

MR. WILNER: This is what he got the information from. This is all C. D.'s work.

THE COURT: Well, and what bothers me is you are presenting her testimony without any ability to cross-examine, and he has already said at least six times to six different passages that he did not agree and didn't rely on it.

MR. WILNER: Well, let's see if -- let's ask him a few more. Maybe he will agree.

MR. MATTHEWS: Well, this is an expert that hired this lady to do this work --

THE COURT: He didn't hire her he said to comment, to gave her editorial comment on it, Mr. Matthews.

MR. MATTHEWS: I don't think he said that,

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Your Honor.

MR. WILNER: I don't know that that is true.

THE COURT: I don't know that it is true or not either, but that is what he said. He said he wanted her to summarize the articles for him.

MR. WILNER: But he received this, discussed it, and she continued to do it. I don't think we're bound by his denials. We're not bound by a witness just being able to deny and say, well, I don't agree with this, Your Honor.

THE COURT: Well, I guess, the problem

is --

MR. WILNER: If he relies on this, he has got to rely on all of it. He can't pick and choose from the information that he gets, or at least, if he does pick and choose --

THE COURT: Why can't he to form his opinion? You're saying that if he read a book, he can't pick out the passages that he wants from that book?

MR. WILNER: Yes. But I can cross- -- if he read the book and he picks out some of them, I can pick out the ones that he chooses not to endorse and say, what about that?

THE COURT: Hey, look, any one that she summarized that he doesn't like, you can --

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MR. WILNER: Sure.
THE COURT: -- question him on.
MR. WILNER: Of course.
THE COURT: But we're talking about her editorial comment, which --
MR. WILNER: Which is all editorial.
MR. MATTHEWS: The thing is it is not editorial comment. It's a --
THE COURT: No. No, no, it's a summary.
MR. MATTHEWS: -- researcher that he

hired, and he has got that, and he read that. Now, he can say whatever he wants to about her, but he has got that, and she went out -- we didn't make these up. They went out and she put them in there herself.
THE COURT: I didn't say you made them up, Mr. Matthews. I mean --
MR. MATTHEWS: But my point is it would be no different than any other expert --
THE COURT: The objection is not that you made them up, okay.
MR. WILNER: I don't know what the objection is.
MR. RILEY: The objection is, Your Honor, that it is based on hearsay and it's seeking to introduce testimony from a witness who is not here, and he hasn't relied on it.
THE COURT: Well, I mean, an expert

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witness, you know, can rely on hearsay and --

MR. RILEY: But he's not relying on this.

THE COURT: You know, but I mean, the hearsay I'm not concerned with. Those are his notes and he read them, so I think he can be cross-examined on his notes.

I'll let you go into a little more of it,

but if you spend all the hour and a half talking about C. D., I'm going to start sustaining objections because I don't -- he has testified very clearly that he did not rely on that. Now, you don't like that testimony, but that doesn't change it. He says he didn't rely on her notes -- or her notes or editorial comment.

MR. WILNER: And that is fine, but I think that on cross if he has to deny it, then that is fine, then let him deny it in front of the jury. I don't have to accept --

THE COURT: Well, he's already done it about six times.

MR. WILNER: But these are not the same. They are different. They are different subjects. I want him to deny it again if he is going to.

MR. RILEY: Judge, he has already denied it several times, and I would object to any further questions which incorporate the use of these editorial comments by C. D., and I would object to

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displaying that any further to the jury, because I think it is unfair and prejudicial.

THE COURT: Well, I'm going to let you ask him about his opinion, Mr. Wilner, but I'm not going to let you go on and on and on about her opinion.

MR. WILNER: Well, I have some more to ask.

THE COURT: I'll see where we go on that.

MR. WILNER: Okay.

THE COURT: So I'll overrule your objection at this point, Mr. Riley.

MR. MATTHEWS: Judge, in light -- so that we could shorten this, could we take five minutes then to go through what we want to do real quick? Would that be appropriate?

THE COURT: You mean --

MR. MATTHEWS: With Mr. Wilner let me just go through what -- so we can -- in light of Your Honor's ruling. I don't want to transgress that.

THE COURT: Well, what I don't want is for the -- you know, he is talking about another hour and a half on cross-examination --

MR. MATTHEWS: And we'll shorten --

THE COURT: -- subject is about C. D. I mean, you know --

MR. MATTHEWS: That's what we're trying to shorten. If we could have five minutes, I could --

THE COURT: I'll give you five minutes,

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but that's it.

(Side-bar conference concluded;

proceedings resumed before the jury)

THE COURT: Just be at ease for about five minutes, and then we'll start at 8:15, okay. I'll be right back.

(Discussion off record and recess)

MR. MATTHEWS: I think we're ready, Judge.

MR. WILNER: Ready.

THE COURT: Mr. Riley, do you want to go ahead and start or are you waiting for Mr. Nyhan and Mr. Browning?

MR. RILEY: If we could wait just a second, Your Honor.

THE COURT: Okay. I told them five minutes, and it hasn't been five minutes.

MR. WILNER: Your Honor, before we start, we'd like to move into evidence the documents that we talked about yesterday, the TIRC.

THE COURT: Okay.

MR. RILEY: Subject to the same objection, Your Honor.

THE COURT: All right. I'll overrule the objection.

What is the number?

THE CLERK: 39, sir.

THE COURT: Okay.

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THE CLERK: I don't have them.

THE COURT: They are here. Here it is. I have got it.

THE CLERK: No wonder I couldn't find it.

(Plaintiff's Exhibit No. 39 was received in evidence)

THE COURT: Are you ready, Mr. Riley?

MR. RILEY: Yes, Your Honor.

THE COURT: Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Bring them in, please.

(Jury enters courtroom)

THE COURT: Good morning, ladies and gentlemen. Again, I apologize to you, but again we were working. Dr. Tulchin, if you'd come up, please, and have a seat on the witness stand.

(The witness resumes the stand)

THE COURT: Good morning.

THE WITNESS: Good morning, sir.

THE COURT: Obviously you're still under oath.

THE WITNESS: Yes, sir.

THE COURT: Mr. Wilner, you may proceed whenever you are ready.

MR. WILNER: Yes, Your Honor.

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CROSS-EXAMINATION (Continued)

BY MR. WILNER:

Q Dr. Tulchin, good morning.

A Good morning, sir.

Q Did you have a chance to read through your notes again last night?

A To which notes are you referring?

Q To your historical notes.

A No, sir, I did not.

Q You have them with you, though?

A No, sir, I don't.

Q Where did you -- did you leave them back in -- I forgot where you're from. Sorry, where are you from?

A Washington, D.C.

Q Did you leave them back there?

A I did.

Q Okay. And did you make any notes at all to help your recollection of things?

THE COURT: When are you talking about? Do you mean --

MR. WILNER: For his testimony today.

A I make notes when I do research. Is that what you mean -- you were asking?

Q No, I mean --

A I'm sorry. I don't understand your

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question.

Q Do you have any notes today?

A No, sir.

Q Nothing at all?

A No, sir.

Q Okay. Did you have a chance to discuss your testimony with the attorneys here?

A I did not.

Q Did you have a nice rest last night?

A Unfortunately it was not as long as I'd like.

Q Okay. Well, we'll try to get you back today.

Remember we asked -- I asked you yesterday whether there had been a counterattack by the cigarette industry against the Reader's Digest?

A I recall you asked that question, yes.

Q Did you find in the history that you reviewed that there was such a counterattack?

A I wouldn't characterize it that way, Mr. Wilner.

Q Let me show you a document entitled the "Tobacco Institute Briefing, December 8th, 1976."

MR. RILEY: Your Honor --

MR. WILNER: Cross-examination.

MR. RILEY: Your Honor, I object to that --

THE COURT: What is --

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MR. RILEY: -- on this as to the foundation.

THE COURT: I don't know what the document is, so I need to --

MR. WILNER: That is fine.

MR. RILEY: Well, I don't either, Your Honor.

THE COURT: Well, then --

MR. WILNER: Okay.

THE COURT: What do you mean it's fine?

MR. WILNER: Well, he's objecting. I'll do whatever the Court wants me to.

THE COURT: Well, then I need to see it. And I need the court reporter over here.

(Side-bar conference held outside the hearing of the jury)

THE COURT: Okay, in the first place is this part of any of -- is it already in evidence?

MR. WILNER: No, no. It's cross-examination.

THE COURT: Okay. Well, that is fine. I

just wanted to know if it was in evidence.

All right, what is your objection, Mr. Riley?

MR. RILEY: Your Honor, there is no foundation that this -- well, first it's beyond the time period that we offered this witness's testimony

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on. We offered the testimony up to the period 1969, in addition to which, as I think as the witness has testified, he has not reviewed any internal documents of any of the companies. This appears to be an internal document, and it is not part of his testimony.

THE COURT: The only question I think I need for you to address is it's 1976. He has testified '40s, '50s, and '60s.

MR. WILNER: Well, the only point in here is that it says we counterattack it every time we can. The question is whether that remark given in '76 applies to the general past. And if they're doing it in '76, then we do not have a document --

THE COURT: Well, I mean, is that what you're going to ask him?

MR. RILEY: Well, this witness --

THE COURT: Well, then --

MR. RILEY: -- there is no foundation for

that.

THE COURT: -- I'll allow him to answer if he can. But I think you need to put it in the context of 1976 in your answer -- I mean, in your question.

He has testified that he was asked to research, common knowledge, the '40s, '50s, and '60s. And I mean, you know, if you've got something from the '60s, then not only you can ask

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him about it, I'd probably put it into evidence, okay.

MR. WILNER: Your Honor, first, the common knowledge is the '70s, as he testified, is affected by what went on the '60s, so the evidence of what it is later may be relevant to what happened before.

THE COURT: Well, I have said that you can ask him that question, but I think you need to relate it back to the time period he is talking about --

MR. WILNER: Okay.

THE COURT: -- because we have taken great pains on both sides concerning preemption, so... And what I am talking about, that's why they have brought him to '40s, '50s, and '60s and not have him testify about the '70s. You see, that is what

bothers me, and then you're going to ask him, well, in the '70s the strategy was such.

Now, I don't mind if you ask him that question and say, do you know if this was their --

MR. RILEY: But, of course, he's already asked him that very question, and he said no, Judge.

MR. WILNER: Well, conspiracy extends to the present, so he may be -- he may give testimony inadvertently, although, not called by the defense to give -- by the defense to give testimony on a certain area that they want him to. It may turn out

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that if it's relevant and part of his expertise and related to his other testimony, that it is relevant for another purpose. That happens all the time in trial. In other words, the fact that they say he's limited --

THE COURT: If you can relate it --

MR. WILNER: Okay.

THE COURT: -- to the period of time that he testified to, '40s, '50s, and '60s, I don't have a problem. But I do have a problem with -- and if you don't tell him when that meeting took place and that it's 1976, then can he relate that to the same...

MR. WILNER: Okay, I'll tell him.

MR. RILEY: Judge, I object to the use of this document and putting it on screen and Mr. Wilner reading from it. The witness has already testified he has no knowledge about whether they counterattacked. I think there is no foundation for this, and I think it is unfair --

THE COURT: Well, I think you need to lay a foundation.

MR. WILNER: Okay.

THE COURT: But other than that I'd...

(Side-bar conference concluded; proceedings resumed before the jury)

BY MR. WILNER:

Q You, based on your historical review, you

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didn't see evidence where the Tobacco Institute counterattacked Reader's Digest?

A What I said, sir, was that I wouldn't characterize it that way. That was your characterization. I believe I gave testimony yesterday that there were various opinions on various different sides of the issues in the public press and in that part of the historic record.

Q Now, the Reader's Digest had been giving out information to the public since the early 1950s, maybe even before, right?

A The first article -- are you referring to smoking or are you referring to --

Q On cigarettes and disease.

A The first article appeared in 1924.

Q And have you consulted with the Tobacco Institute, the agent of the people who hired you, to determine whether they believe they counterattacked the Reader's Digest?

MR. RILEY: Your Honor, I object to the form of that.

THE COURT: All right. I'll sustain the objection to the form of the question.

Q Have you consulted with the Tobacco Institute to see what their opinion is of whether they, from their own -- in their own words, counterattacked the Reader's Digest?

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A No, sir, I did not. I was interested in the historic record.

Q Well, when you say you're interested in the historic record, I mean doesn't that include the opinions of the people who created the record?

A The record is created in a variety of ways. If their opinions made it into a source that would be available to ordinary people in the course of their regular lives, then certainly it would and

would appear there. But if it's a, as you showed yesterday, private documents, which I have not consulted, they do not. They would be -- you and I walking down the street going to the club or whatever would not see those.

Q So an historian never goes to the original sources and asks the people what was your intent? What were you doing? That is not part of history, sir?

A Yes, sir.

Q It is, isn't it?

A It could be.

Q All right.

A It depends on what your historical purpose was, sir.

Q Well, it depends on what your historical purpose was, doesn't it?

A Yes. And I have explained what mine is.

Q Your historical purpose was to offer

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testimony for the cigarette industry, wasn't it?

A My historical purpose was to understand public awareness about the relationship between smoking cigarettes and hazards to health.

Q And you know --

A I did a comprehensive survey of the

sources available to the public on which that awareness might properly be understood.

Q And you know that one of the major sources of awareness or disinformation to the public was the Tobacco Institute, right?

A Sir, I wouldn't characterize it that way. I wouldn't know that.

Q Well, you mean you didn't even ask what the contribution of the Tobacco Institute was to public information?

A I made a comprehensive and detailed survey of sources available to ordinary people concerning the links between smoking cigarettes and risks to health.

Q And when the Tobacco Institute people and the TIRC people get on television and speak about the various research they have done and the fact that cigarettes aren't dangerous, that wasn't part of the historical record?

A In that particular case it absolutely does, as I watched that television program.

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Q Sir, did you ever think of going to the Tobacco Institute and saying, hey, I'd like to find out what was the scope of your activity? What was your intent? How did you accomplish it? Did you

ever do that?

A No, because I was concerned with how -- whatever activity of theirs or of antismoking groups would reach the public in a manner that was accessible to them so that it could be understood as part of their awareness.

Q I thought when historians did work they went and they interviewed some of the major players of the day.

A That would be a different kind of history.

Q Different kind from the history that you're doing, right?

A It would not necessarily go with public awareness, sir.

Q So you do a different kind of history than that?

A In this case my purpose was to understand what the public knew about that controversy.

Q And you restricted your examination of history because in this case you were being paid?

MR. RILEY: Objection, Your Honor.

THE COURT: I'll sustain the objection.

Q Why did you restrict your examination of history then, sir?

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A As I tried to explain in my original

testimony, the historical method used to understand public awareness called social history looks at materials that would have been available to the people whose lives are of interest to us. In this case it's not members of an elite organization, whether it's an antismoking group or a smoking industry, and we focus rather on broad segments of the population, ordinary people. So in this case we were interested in knowing what ordinary people knew about the risks of smoking cigarettes.

Q Who is "we"?

A Those who were conducting historical research on the subject, and I told you that I was asked to conduct historical research on public awareness of the risks between smoking cigarettes and health.

Q All right. Maybe I misheard what you just said there. Let me see if I can get it straight because you said "we." You used the word "we" were interested. Who is "we"?

A In this case it would be I and the people who worked for me on this case.

Q Oh, including your research assistants?

A Yes, they would be.

Q Okay, so you were a team?

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A I suppose so.

Q Okay, fine. So you all had the same purpose, basically --

A To conduct historical research.

Q That was the "we" you meant, though, you and your research assistants?

A They under my instruction, that is correct.

Q Including C. D.?

A Yes, sir, during the time she worked for me.

Q Okay. So let me go on to something else.

Now, let's look at -- remember we were talking about the Miami Herald from your notes?

A I do.

Q And these are your notes, right, a summary of articles found in the Miami Herald?

A I believe I said yesterday that those are summaries made at my request for me. They are my notes in the sense that they are in my file. They were prepared on my -- at my request by a research assistant.

Q Okay. Let's try July 13th, 1961.

MR. RILEY: Your Honor, I object on the basis stated before.

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THE COURT: All right. I'll overrule your objection at this point, Mr. Riley.

Q Okay. No butts about -- oh, I got my thing. Look out. Okay, No butts about today's TV heroes. No butts about today's TV heroes. A letter to the editor regarding the stereotypes used by television to characterize their characters. Quote --

MR. WILNER: Would you move that over a little bit, Ginny. Okay, you are at the end.

Q -- It's easy to pick the victim. He in a tense moment grabs a fag.

What's a fag?

A It's a slang term for a cigarette.

Q Another one of those slang terms. You gave us some slang terms before that I wanted to make sure I understood. One was -- let me write them down. One is a fag. That's not in use so much anymore, right?

A I wouldn't think so. I don't hear it often myself.

Q All right. Well, this says the guy grabbed it in 1961.

Another one is a little white slaver. That used to be used?

A Yes, sir.

Q White, what do you mean white slaver; what

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does that mean?

A It refers to the color of the cigarette paper.

Q Are you sure? Are you sure that is what it means?

A I believe that is the case, yes.

Q You don't think that means something else about slavers, do you?

A I don't think so, no, sir.

Q Well, you think when this was used -- well, in fact, when that was used, how many years ago was that?

A Well, there are examples of that back into the 19th Century.

Q And when did cigarettes start being wrapped in white as opposed to dark brown paper?

A There was white paper in the early 20th Century, and I don't know the answer to that, but probably quite early.

Q But you just said the early 20th Century, and you said this dates back into the 19th Century?

A Yes, sir.

Q So the white in here might not be about

the cigarette paper, might not it?

A The only references I've ever seen to that phrase are in references to smoking cigarettes.

Q Well, I didn't ask that. I was asking about the white. If the cigarettes weren't white,

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what do you think this was about?

A I don't know. As I say, the only references I have been able to read refer to the smoking of cigarettes.

Q All right. The next is coffin nail, which you talked a lot about, right? You talked a lot about coffin nail, didn't you?

A We mentioned them several times, yes.

Q Now, you went through the -- through movies, evidently, and tried to pick out the sound track that said coffin nail or in one case Sinatra says, "Give me a nail," right? Didn't you do that?

A Yes, sir.

Q Did you look at those whole movies?

A We were looking for examples of how people talked to one another about cigarettes.

Q "We" again, the same "we," or a different "we"?

A I went through those films. On occasion my research assistants would help me and go through

the films and the film clips to find references to how people spoke to one another about cigarettes, specifically looking for clear examples of what we know of the way people talk to one another about smoking cigarettes.

(Change of reporter, 8:30 a.m.)

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Q How many films did you go through?
A Dozens.
Q Where are the ones that you didn't pick?
A I picked the ones that were clearest examples.
Q Where are the other dozens? Which ones did you look at?
A Back in the film libraries.
Q How did you know? I mean, there are thousands of films. How did you just happen to pick

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these films...these films?

A There are other historians who have made specific studies of the film industry and films themselves, and there are film archives in universities around the country.

Q So there's a film archive that says here's where Frank Sinatra says "nail," like coffin nail? There's an archive for that?

A Well, Mr. Wilner, there's an archive of films.

Q Yes, sir.

A And I have testified that I have seen films. And I put them in the video machine, and I looked at the films.

Q Well, sir, I guess I'm not asking you the

question properly, and let me apologize. But how many -- how many films are there from -- if you consider everything from 1940 to 1970 or whenever you stopped looking at it, how many films do you think there are?

A I wouldn't know.

Q Well, how did you find these little passages that said "nail" out of all these thousands of films? I mean, that must have taken years to do that kind of work. How could you possibly do it?

A As a matter of fact, some of them I'd seen when I was younger.

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Q You remember?

A I remember "From Here to Eternity," for example.

Q Just that passage?

A I didn't say that.

Q Well, you must have watched the whole film to pull out that one passage.

A That wasn't hard.

Q So you did? You looked at the whole film, just pulled out the three-second thing about "nail"?

A Yes, sir, in that case I did.

Q So you charged for watching the whole film? Is that on your bill somewhere?

A I don't recall that.

Q You mean you would have done it for free?

A I saw it the first time for free.

Q And you would have seen it for free the second time?

A It's a good movie.

Q Yeah? That good? So that's not the only one. So you said Robert Mitchum, "30 Seconds Over Tokyo;" did you happen to remember that one?

A That was referred to me by a colleague who had done a study of films and film archives related to smoking.

Q So there's somebody else involved in this project, this colleague, who evidently had something to do with this cigarette contract; doesn't he?

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A There are other historians who have made studies of different facets of the history of smoking.

Q So there are other historians who have been paid by the cigarette industry as well, right?

A I can't say that, sir. For example, there are a number of people who have written books about it who provided information and suggestions as to what sources to use in studying the history of cigarettes and health.

Q Who was this colleague?

A Tom DeBaco was the film historian.

Q So you went to Tom and Tom -- did he get paid by American Tobacco, too?

A I don't know that.

Q You went to Tom and you said, I'd like to know what movies somebody says "coffin nail" in?

A I asked him what movies he had looked at that were interesting and illustrative about the history of smoking.

Q That's all? That's all you asked him?

A Yes, sir.

Q And he gave you what?

A Gave me several suggestions for me to go out and look at.

Q Which ones?

A I think you've seen the examples of them.

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Q You said you saw dozens, and you picked out these ten-second spots from one, two, three, four, five, six, but I don't know what's the rest. Can't remember?

A No, sir, I'm sorry.

Q Wait a minute, you watched the whole film of 12 films, and now you can't remember?

A I don't recall the titles of those that we

looked at. Sometimes we skimmed them, sometimes we went through them quickly, sometimes one of my assistants might have looked through it on my behalf.

Q Oh, you mean you didn't necessarily look at it yourself, the whole thing?

A Sometimes I did and sometimes I didn't. If there was a series -- if there was something that someone thought was of interest to me to the project, they brought it to me, I reviewed it. I turned it down or I accepted it and passed it on to a smaller sample that I thought might be illustrative of what I thought we were trying to show.

Q Illustrative, that's your word.

A That's the word I used.

Q Okay. Well, I'm just -- and I apologize, but you said you looked -- you looked all the way through the three hours of this movie where Frank Sinatra said "nail."

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A "From Here to Eternity."

Q "From Here to Eternity." And you did actually look at that yourself, all three hours?

A I don't recall it being that long, but I looked through it.

Q The whole film?

A As I said, there's a fast forward button on the movie. And there were some scenes that seemed to be clearly not relevant.

Q Okay. I'm just curious if you looked through all these 12 and why you can't tell me what the other six were.

A I'm sorry, I can't recall the names.

Q Not ever remember basically what they were about?

A I'm sorry, I can't.

Q You didn't see them at all, did you?

A Sir, that's not true.

Q Okay. Let's get back to this. "No Butts About Today's TV Heroes." This is back from your notes of the "Miami Herald" July 13, 1961 --

A Excuse me, those are not my notes, as I indicated. Those are notes made by my research assistants.

Q Which is part of the "we," isn't it? We were interested?

A Then I don't know whether you're being

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precise or trying to sort of confuse the two.

Q Oh, yes.

A Those are notes made by a research

assistant which are in my files which I used in order to try and understand the historical records.

Q And your remarks are that I'm trying to confuse?

A No, I asked. I'm trying to clarify the use of your notes.

Q All right, sir. Let's finish. It's easy to pick a victim in a tense moment, grabs a fag. And that's what got me off on this. I'm not quite there.

If a cigar smoker is exhibited, he is a tycoon giving the orders. Who is the hero? He's the ciggie boy planning to run away with the big boy's wife.

All of that is part of something that ran on 6A, on July 13, 1961, "No Butts About Today's TV Heroes." See that?

A Yes, sir.

Q And then part of your "we," part of your groups says, This shows that television does have an effect on the viewer in creating images of heroes and villains with props. The protagonist of a show making a cigarette was an advertisement for the cigarette. Was the industry involved in paying for these characters to smoke?

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Now, is that a comment from your group?

A Sir, as I tried to explain yesterday when you raised this issue, those are unsolicited editorial remarks by a young lady whose initials are C.D. commenting upon things that she read.

She is not a trained historian. She made those remarks on her own, unsolicited, and they have no basis on my research.

Q Right. And what we're interested in is when you said "we were interested," she was part of the "we"?

A She was working at my instruction as a research assistant in the files of the "Miami Herald."

Q All right. Well, let's talk about do you agree or disagree with these remarks, "Television does have an effect on the viewer in creating an image of heroes and villains with props." Do you agree?

A No, sir, I don't.

Q You don't agree with that? Television does not have an effect on the viewer in creating images of heroes and villains?

A I don't know that and neither does C.D. That's why I say these remarks do not help in

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forming a basis of understanding of the historical record. I'm not an expert on ads, and certainly she isn't.

Q I didn't say anything about advertisements. Just a minute. Maybe I didn't speak clearly. I'll try again.

This says -- this shows that television does have an effect on the viewer in creating images of heroes and villains with props. Do you agree or disagree?

A It might or it might not.

Q You don't know?

A I don't know. We don't know.

Q You mean, "we" is -- who is "we" now?

A Perhaps you and I.

Q You and I?

A I would just be including us.

Q Well, I know, sir. Don't include me in your remark, please.

A I apologize.

MR. RILEY: Your Honor, I object, argumentative.

THE COURT: I'll sustain the objection. I don't want you-all arguing with each other, both of you, okay.

Q When you said we don't know, I want to

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know who that "we" is.

A I apologize. I should have said I.

Q You don't know. So your testimony here as an historian with a degree in history is that you don't know whether television has an effect on viewers in creating images of heroes and villains?

MR. RILEY: Your Honor, objection.

THE COURT: I think he's answered that.

MR. WILNER: Your answer is you don't know?

MR. RILEY: Objection.

THE COURT: He's already answered it he doesn't know, Mr. Wilner.

MR. WILNER: Okay. I'll withdraw it.

Q How about this: The protagonist of a show creating smoking a cigarette was an advertisement for the cigarette. Do you agree with that?

A Not necessarily.

Q I didn't say necessarily. That was not in my question. Do you agree with that statement?

MR. RILEY: Judge, I object to the argument.

MR. WILNER: In this case?

THE COURT: I'll sustain the argument -- I

mean the objection.

Q Did you see -- remember when we looked at "See It Now"?

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A Yes, sir.

Q What was on -- do you remember the Lucille Ball Show?

A I have seen it on occasion.

Q I mean, it was a common show at the time, wasn't it? Lucille and Desi Arnez, "I Love Lucie"?

A Yes, sir.

Q Didn't that go into almost everybody's house in the '50s? Didn't everybody know Lucie?

A I don't know the answer to that. I saw it on occasion.

Q You saw it on occasion. Okay. And you don't know whether it was a popular show?

A It was a popular show. I don't know if it went into every house in America.

Q Did Lucille Ball advertise cigarettes in character, in the character of Lucille Ball during the time that the show was going on and not separated out by an advertisement?

A I don't know that.

Q You never looked?

A I don't recall her doing that.

Q Well, I mean, did you go and look?

A No, sir.

Q No investigation?

A Are you talking about research?

Q Yes. Whatever you do.

A I did not go back and do research on

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Lucille Ball.

Q Did you go back and do research on what people were watching in their televisions every night besides that one "See It Now"?

A I have looked at the TV film archive from the University of Miami and selections made from that by Professor DeBaco.

Q By who?

A An historian whose name is Tom DeBaco.

Q You mean there's another person involved in this project?

A I mentioned him earlier.

Q What has he got to do with this?

A It is he who has made the study of films in the Florida archives.

Q Films?

A Excuse me, I misspoke. TV.

Q So someone else has done a study of television -- someone else has done a study of

television other than you, and you've relied on it?

A Yes, sir.

Q Where is it? Where is the study?

A The study is in the form of film clips.

Q So someone else went through and did film clips. You saw them and you relied on them?

A I relied on the film clips that were consistent with the other evidence being collected

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in the historical research.

Q Where are these film clips? Can we look at them?

A If you wish, of course.

Q Where are they?

A They're at home in my archive.

Q Well, sir, you say you relied on some information that some other historian gave you. You didn't bring it here today for us to look at; is that fair?

A I did bring the representation of it, of course.

Q You brought the one piece of the "See It Now" which we played -- which we played the rest of, right?

A Yes, sir.

Q And the piece you chose to play, that

didn't even have the AMA on there saying, oh, it's not proven. The statistics don't prove anything. You didn't even play that. Was that on the film clip?

A Yes, it was.

Q Why didn't you play it?

A Because it didn't represent for me the reflection of the common knowledge of the dangers of cigarette smoking at that age.

Q You didn't --

A And what I was trying to demonstrate was

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the clarity of common knowledge at that time.

Q You didn't play it, sir, because it didn't agree with your -- the conclusion that you'd be paid to reach?

MR. RILEY: Your Honor, I object. This is argumentative.

THE COURT: I'll sustain the objection.

Q Let's look at 1963. Your notes from the Herald.

MR. RILEY: Judge, I have the same objection to this.

THE COURT: I'll sustain the objection to the form of the question.

MR. WILNER; I haven't asked it.

THE COURT: You said his notes from the Herald. He said several times they were C.D.'s notes.

Q Let me get it straight then. C.D. wrote this entire summary here, right, beginning October 12, '63, page 4D of AP, right? While you're reading I'll go ahead and read it so we'll understand what's going on.

Tobacco industry leader challenges cancer theory. Tobacco Institute president George V. Allen -- do you know who he was?

A The president of the Tobacco Institute.

Q That's what it says, but do you know his

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history? Do you know what he did?

A No, sir.

Q Did you consult with anybody about who George Allen was?

A No, sir.

Q Try to get any of George Allen's documents?

A No, sir.

Q Told the annual convention of the Retail Tobacco Dealers of America that the, quote, original theory about smoking and lung cancer, the theory that smoke was a direct contact carcinogen, cancer

generator, has virtually been abandoned. And by 1963 -- do you see that?

A I do.

Q And that happened in the "Miami Herald" or was there a mistake? Is it in the "Miami Herald"?

A It appears to have been.

Q Is this a mistake? When you say it appears to have been, was it as far as you know?

A As far as I know it was in the "Miami Herald."

Q Did you go verify this for yourself?

A This particular article I perhaps did not. I cannot guarantee that. What I did was to refer on a regular basis to check the work done by each of my research assistants.

Q I thought --

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A And so long as I found their summaries to be accurate, I sent them back to continue their work. I did not check every single one of them. But I did check on a regular basis to make sure that they were performing their summaries in a way that I considered to be fair and accurate.

Q So you checked to make sure they were performing their summaries in a way that you considered fair and accurate?

A Yes, sir.

Q Okay. So I thought you said that the first thing you did was you got all the original clippings and you looked at all the original clippings, and then you sent everybody back out to make summaries; is that what happened?

A I went to the Library of Congress to find the original collection of a newspaper. Where it exists on microfilm, you would roll the microfilm through a microfilm reader and select articles that were relevant to the study of the history of cigarette smoking and its relation to health hazards.

Those articles would be photocopied. I would go through the pile of articles and select those that seemed to be the most relevant. Those then would be summarized. These summaries, one page of which is on the screen, were brought back to me.

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And as I've just indicated, periodically I would check the work of the assistants who were doing this for me.

Q Okay. He said people sometimes forget that there are good reasons why the theories about smoking and health problems are in dispute and often questioned by responsible scientists. His reasons

for doubt include: One, the case against smoking still rests largely on statistical studies, intensive clinical and laboratory research has failed to provide verification necessary to show a cause-and-effect role for smoking. There is growing interest in the possible role of constitutional and genetic factors.

What does he mean "constitutional factors"?

A I think he's referring to an individual's constitution.

Q And the constitution is like their genes, right? Isn't that kind of the --

A I would have thought when he was referring to genes that was what he was doing in the phrase "genetic factors."

Q Let me show just the picture, Ginny. You know who this is?

A No, sir.

Q That's Clarence Cook Little. You know who he is?

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A Yes, sir. I don't recognize him.

Q He was the first president of the Scientific Advisory Board of TIRC. You know what his field was, incidentally?

A He was a scientist.

Q That's all you know is that he was a scientist?

A That's all I can remember.

Q He wasn't a doctor, right? Medical doctor?

A I don't believe so. I think he was a Ph.D. scientist.

Q What is eugenics?

MR. RILEY: Objection, Your Honor. Relevance.

MR. WILNER: It's relevant, Your Honor. I just have to ask another question to tie it up.

THE COURT: Tie it up pretty quickly.

Q Eugenics. I can't spell. Do you know what the eugenics movement was in this country?

A No, sir.

Q As a historian -- I want to make sure I'm pronouncing it right. Have you ever heard of it, heard what eugenics --

A Eugentics? I don't know what eugentics is.

Q I spelled it wrong because I was under

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pressure. It's eugenics, eugen --

MS. STEIGER: Take out the T.

MR. WILNER: Let me try it again. My mind goes blank when I try to spell. E-u-g-e-n-i-c-s. Thanks.

Eugenics. Is that better. Now you know what it is?

A Yes, but I'm not a very good scientist, but my sense is that it's a study of genetics -- genetic characteristics are passed on; is that right?

Q There was a big movement in the United States in 1920, in the 1920s, about -- and between the wars, between World War I and World War II known as the eugenics movement. Were you aware of that?

A Very vaguely.

Q Well, is that -- is the fact that you're vaguely, only vaguely aware because your specialty is in Latin American history and in the history of foreign policy and not in domestic or U.S. history?

MR. RILEY: Objection, Your Honor. He's arguing with the witness.

THE COURT: I'll sustain the objection. Try not to argue with him, Mr. Wilner.

Q Have you conducted a study of how scientific doctrine has affected United States beliefs at home?

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A No, sir, I've not done that as a comprehensive study.

Q Is that not part of -- does eugenics have anything to do with Latin American history?

A Not very much that I know of.

Q You know -- are you aware that it was the eugenics movement that put the racial quotas into U.S. immigration?

MR. RILEY: Your Honor, I object.

THE COURT: Approach the side bar, Mr. Wilner.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Judge --

THE COURT: You said you were going to tie it up sometime.

MR. WILNER: I am.

THE COURT: When --

MR. WILNER: I just didn't get a chance.

THE COURT: When do you plan to do that?

MR. WILNER: Right this question. Clarence Cook Little, he's the eugenicist. Eugenics is the constitutional hypothesis. Those are the constitutional factors.

MR. RILEY: Judge --

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THE COURT: What does that have to do --

MR. RILEY: There's no foundation.

THE COURT: -- with what this witness has testified?

MR. WILNER: Number one --

THE COURT: Why is it relevant to his testimony? It may be relevant to the case.

MR. WILNER: It discredits him, who has claimed historical knowledge. He doesn't even understand where the roots of the constitutional theory came from. He's come up here to try and tell us how as a historian. He hasn't come in just to read articles. He's come in and said, I've used my judgment as a historian. I want you to trust me because I'm a historian. I'm a Ph.D., and I use these methods.

THE COURT: All he's testified to and he says all he was asked to determine was whether or not there was common knowledge concerning the dangers of cigarette smoking.

MR. WILNER: Right.

THE COURT: Okay.

MR. WILNER: But he doesn't -- what he says is I want you to trust my opinion because I'm a Ph.D.

THE COURT: Well, and the fact --

MR. WILNER: Because I know history.

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Well, let's see if he knows history.

THE COURT: So you're going off on a tangent asking him about eugenics and what it is and what is the study of it, and because eugenics was founded longer than yesterday it makes it relevant because he's an historian?

MR. WILNER: No, because it's related to cigarettes through Clarence Cook Little and the constitutional hypothesis. That's why it's not a tangent. It has everything --

THE COURT: If you're going to relate it, get on to it, because I don't see any relevance yet.

MR. RILEY: There's no foundation.

MR. WILNER: Sometimes you have to go around to the back before you open the door.

THE COURT: And I'm here to make sure you do it fairly, Mr. Wilner --

MR. WILNER: I understand.

THE COURT: -- and not unfairly, okay. And the problem with that is I don't -- I mean, if you want to ask him something about a statement by Clarence Cook Little, fine. He's already said he's vaguely aware of what eugenics is. Now, are you

going to tell him what it is?

MR. WILNER: Well, I'm going to see if I can refresh his recollection, but I think I've already done it; so now I'm going to connect it.

THE COURT: Well, then don't ask him any

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more questions about what eugenics is then. I'll sustain the objection to that, okay. We'll see where we going from here, Mr. Riley.

MR. RILEY: Thank you, Your Honor.

(Side-bar conference concluded; proceedings resumed before the jury)

BY MR. WILNER:

Q Clarence Cook Little had been a proponent of eugenics; did you know that?

A No, sir, I did not.

Q Did you know that when Clarence Cook Little was chosen for the Scientific Advisory Board that his views that cigarettes -- or that rather disease was caused by the genetic inferiority of people were the reason that he was chosen?

MR. RILEY: Objection, Your Honor. Argumentative.

THE COURT: I'll sustain the objection.

Q Did you go and attempt to interview anyone on Clarence Cook Little?

A No, sir.

Q Let's go back to what was in the paper. So do you know whether the constitution -- this mention of the constitutional factors, do you know whether that has anything to do with eugenics?

A From a medical standpoint, no, I do not. I would read that as referring to my physical

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constitutional, my health.

Q Okay. And then next it says and genetic factors; do you see that?

A Yes, I do.

Q Allen claims that inhalation of tobacco smoke by laboratory animals in many experiments over the years has consistently failed to produce lung cancer, and that viruses in combination with other factors have produced lung cancer in experimental animals. Allen also -- next page, please.

MR. RILEY: Your Honor, may we approach?

THE COURT: All right.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Judge, I object to displaying the next part of this. We're going to notes by C.D., and I object to putting this up on the board.

MR. WILNER: He's now reaffirmed that he

went through and confirmed what they said and that it was a team.

MR. RILEY: Your Honor, he did not rely on this. He specifically said he did not rely on this.

MR. WILNER: He can't get away from it by just picking and choosing the things he doesn't agree with. He doesn't have --

THE COURT: He hasn't so far agreed with any of her editorial comments. I don't understand what you mean. It doesn't have anything to do with

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what he was asked to do.

MR. WILNER: Well, who says? I mean, I don't think --

THE COURT: I'm saying from reading it.

MR. WILNER: I understand.

THE COURT: I mean, you know, you can disagree with my opinion, but I have to apply the rules, you know.

MR. WILNER: I understand, but that's exactly what he was asked to do.

THE COURT: If she wrote on the bottom of the page "I love you," you know --

MR. WILNER: No, it wouldn't be relevant.

THE COURT: It wouldn't be relevant? Well, it's her opinion.

MR. WILNER: It wouldn't be relevant, because he has to account -- it has to be related to the article that she read and the interpretation of it.

THE COURT: What bothers me, Mr. Wilner, is they have constantly objected to interjecting her opinion into the trial. All right, they can't cross-examine her, all right. He has said over and over and over again that he did not rely on her opinion.

MR. WILNER: But he's giving contradictory testimony.

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THE COURT: No, he -- not about her opinion.

MR. WILNER: But we've established that the whole thing is her opinion.

THE COURT: No, we have not.

MR. WILNER: I'll do it.

THE COURT: You have established that those are some summarize of articles.

MR. WILNER: Summaries involving interpretation. You can't -- as long as it's not a direct quote.

THE COURT: Most of it has been direct quotes.

MR. WILNER: Well, that's fine. I'll be happy to address that. Also, it involves her interpretation because if you say that you're only quoting from part of an article but you choose to leave the rest of it unquoted, that involves interpretation.

Whenever you rely on somebody else to quote from you, then what they say about the exact thing that they're talking about, that this article --

THE COURT: If it has anything to do with his testimony, but he wasn't asked to determine whether or not the information that was there was valid information one way or the other. He was asked to determine whether there was information

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there that would have informed the common man, if you will, of the dangers of cigarette smoking.

MR. WILNER: Exactly.

THE COURT: He has never said he was there to determine whether the tobacco industry tried to keep that from happening or whether they didn't, or whether they gave disinformation or whether they didn't. He's just there -- that's why he said very clearly that the private papers of the tobacco company made no difference to him in his opinion,

because he was only asked to determine the narrow issue of what the public knew. And if the private papers were secret, then they couldn't have known what was in there.

MR. WILNER: But, Judge, when do we have to -- can't we show that he stopped -- that he did, that his histologic method is flawed because he closed his eyes to evidence which would have completely changed his opinion, in our view, but he chose not to see it. He just said, I don't want to see it.

I think that when an expert testifies, he can't just say, well, you only asked me to read this section, and I did read that section --

THE COURT: Look, you can ask him about articles that are contrary to his opinion.

MR. WILNER: That's what we're doing.

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THE COURT: That would minimize in the public's mind the danger of cigarette smoking.

MR. WILNER: Right.

THE COURT: But I don't think the public read the comments from C.D.

MR. WILNER: Well, no, no, and I don't think we're limited to that. That's the point. If he relies on C.D., then I think --

THE COURT: No, he said a dozen times he has not relied on her opinion. Now, if you want him to say that a dozen more times... But what I'm talking about is you're getting her opinion in over their objection, and he has said that he has not relied on that opinion.

MR. WILNER: And I think I'm --

THE COURT: Now, if you have some evidence to the contrary, I'd like to see it.

MR. WILNER: We do, because he just reaffirmed that they had a common interest, they had a common goal.

THE COURT: Yes, and that was for her to summarize articles that showed what the public knew or didn't know about, and she apparently did a good job because she's showing articles, she's summarizing articles that would muddy the water. You can go through every one of those if you want.

MR. WILNER: Yes.

THE COURT: But I'm got going to let you

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go through the comments anymore because I don't think -- unless you can get some foundation that he relied on those comments and he said, like I said at least six times, maybe a dozen, that he didn't rely on them.

MR. WILNER: My only point is an expert cannot give self-serving protective testimony by saying that I heard that discussion, somebody came and told me about it. It was one of my team. They argued this, but I chose that I didn't believe it. That's fine, but I'm entitled to say, Well, let's look at what you were told. Why didn't you believe it? That's fair cross.

THE COURT: And he told you that.

MR. WILNER: But we haven't gone to the one of the --

THE COURT: No, he said -- even beyond that he said that all of those comments, as far as he's concerned, are immaterial to the question that he was asked, and that -- you know, her opinion is not on display for the jury. And that's what you want to do.

MR. WILNER: Right.

THE COURT: You want to give them her opinion.

MR. WILNER: Right.

THE COURT: He said he did not rely on her

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opinion. If you want to call C.D. as a witness, and if you can get her qualified, then I'll allow her to testify to her comments if it's relevant, and if

it's not objectionable otherwise.

But you're not -- you're asking the doctor -- what you want to do is present her testimony through this witness. And he said he did not rely on it. You don't have a foundation for it at this point.

MR. WILNER: I think I can make one. I'll try once more.

MR. RILEY: Judge, I'd object to him -- he's testified about six or seven, at least six or seven times how he did not rely on this. And I object to him trying to go back on this. It's been asked and answered. He's been over it many times.

THE COURT: I don't know what question he's going to ask, but I'll sustain the objection if you make one.

MR. MATTHEWS: For the record, could I just point out one thing? I'm not trying to argue with Your Honor, but you keep talking about the fact that he says he didn't rely on her. We're in an entirely different situation than when an expert reads an article or gets a report from another expert and says, no, I didn't rely on that.

Clearly we couldn't question him about the fact of that report if he says he didn't rely on it.

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But this is somebody that, as Woody has pointed out very astutely, this is the same team. Now, he can say all he wants to, I didn't rely on that. I didn't have anything to do with that. But it's her interpretation of it.

He can pawn it off as some little girl who didn't know what she was doing, and I hired her for the summer. But that's his team, and that's what came back. That's the only point that we want to make.

MR. WILNER: Part of what he was given to rely on --

MR. MATTHEWS: The jury has a right to determine whether or not --

THE COURT: I think you've made -- I think you've made -- I mean, you know, he has said over and over again it was not relevant to what he was asked to do.

MR. MATTHEWS: And, Your Honor, he'll say that until the cows come home.

THE COURT: Right, right. And he can keep saying that if I allowed you to get in all of her testimony.

MR. MATTHEWS: And if I were him I'd say the same thing, Judge.

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THE COURT: All of her testimony, you know, but I don't think -- in the first place, her opinion is basically irrelevant until you make it relevant in some way, Mr. Matthews. And, you know, I've given you wide latitude, and I don't see where her opinion is relevant. Now, you can make it relevant by saying -- by getting him to say he relied on it.

And Mr. Wilner has done a very, very credible job of trying to get him to say that but has not been able to get him to say that. You can make it relevant in some other way. If that was part of -- she was asked to summarize the articles, okay, according to him. She did that.

He took the articles and put them in a historical perspective. You certainly can ask him about any article in there, which is contradictory to what his testimony is; but what my problem is, is you-all are not even concerned that much about the articles. You're only concerned about her comments. And I don't think her comments are relevant. And if they are, then if you want, you can subpoena her and get her down here and have her testify.

MR. WILNER: All right. I'll try and lay some more foundation, see where we go.

(Side-bar conference concluded;

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proceedings resumed before the jury)

BY MR. WILNER:

Q We were just we were just discussing, sir, this October 12, 1963, piece in the "Miami Herald" by George V. Allen; do you remember? We just had it up.

A The one that was on the screen?

Q Yes. That was the one you said you couldn't remember whether you saw the article or not, right?

A You mean the original article?

Q Yes.

A Yes, I worked on the summary.

Q Okay. And the -- I want to get this straight. And the summary was that there are both quotes and interpretations in this summary, correct?

A No, sir.

Q No?

A Not to my knowledge.

Q Okay.

A When you say "interpretation," do you mean editorial comment or a digest summary? The summary should be a brief form of the material in the article itself. The interpretation, if that's what

you're referring to, the unsolicited editorial remarks by the research assistant should be in brackets.

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Q I'm not asking you right then -- I just want to look at this for a second. I sorry, I got distracted. I was looking for my laser pen that it looks like I forgot. I lost it. Stuck it down in here. If it surfaces, holler at me.

Here's what I'm curious about. I see some quotes in here. I see where it says, quote, and it has: Tobacco industry leader challenges cancer theory. Then it goes, Tobacco Institute president, George V. Allen told the convention of Tobacco Retailers that the original theory about smoking and lung cancer, he said, people sometimes forget there are good reasons why the theories about smoking and health problems are in dispute and often questioned by responsible scientists. His reason for doubt ensued.

Now, where are the quotes that this is the exact quote from the article, and where are the -- where is the description by -- who is Miss C.D.?

A The research assistant.

Q Who is she? What's her name?

A Her name is Choco Daniels.

Q Choco Daniels?

A Yes. She's a recent graduate of college, went to the University of Michigan, lives in Washington, D.C. She's approximately 23 years old.

Q And you -- no, my question was, do you believe this entire thing to be an exact quote?

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A The quotation remarks are around the materials that I hope to be an exact quote.

Q So when it has -- so these quotation marks indicate the exact quotes, and the rest are what Choco Daniels said about the article, right?

A Those are summaries. For example, it says he said. --

Q Yes.

A The actual article may have been something on the order of, then Mr. Allen went on to say or something like that; and she summarized it and made it briefer.

Q Right. So she looked at the entire article and developed kind of a summary of it, right?

A She produced a summary of it, yes.

Q And you trusted her to do that, right?

A And I checked on her work more frequently at the beginning to make sure or to satisfy myself

that she was doing an accurate job.

Q And she was doing an accurate job?

A As far as I could tell she was, yes, sir.

Q Okay. And then, in addition, she included on the -- well, let me ask you first. When she read these, she didn't just read one article at a time. She read a great deal material from the "Miami Herald" and other sources, right?

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A She went through the files of the "Miami Herald" for a number of years.

Q And you trusted her to do that?

A Yes, sir.

Q And you discussed with her the impressions that she got from doing this, right?

A No, sir. I discussed with her the summaries that she was producing for me and encouraged her to go on and continue to do those.

Q The summary that we've just had up here, was that a summary that she typed or you typed?

A She did.

Q And you had a chance to look at it and respond to it?

A I don't know what you mean by "respond to it."

Q You reviewed it?

A Yes, sir.

Q And was there any part of it that you decided shouldn't be there or was wrong?

A Her editorial remarks were irrelevant to my historical research; is that what you're mean? I didn't censor what she said.

Q So she put in editorial remarks and you had a chance to read them?

A I did.

Q And you said you didn't agree with them?

A I did.

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Q Any of them? None?

MR. RILEY: I object. It's been asked and answered several times.

THE COURT: I'll sustain the objection, Mr. Wilner.

Q How many editorial remarks did she make?

A I don't know exactly how many. She did made them as she went along. We've seen them.

Q And your testimony is that every single one of them you disagreed with?

MR. RILEY: Your Honor, asked and answered.

MR. WILNER: I don't think I answered (sic) that one.

THE COURT: I'll sustain the objection, Mr. Wilner.

Q Do you -- were you asked to determine whether the cigarette industry tried to cover up evidence about cigarettes and disease?

A No, sir. I was asked to do a historical research on public awareness concerning the relationship between cigarette smoking and health.

Q Well, so you don't have an opinion on whether the cigarette industry tried to cover up evidence?

A Certainly not as a basis of my historical research.

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Q Do you have an opinion as to whether the cigarette industry tried to create doubt among its customers that cigarettes were dangerous?

A No, sir, I don't.

Q You don't have an opinion one way or the other?

A Certainly not a definitive opinion.

Q Well, that's a new word. I didn't ask it that way. Do you have an opinion -- let me make sure I'm being clear. You said definitive. Do you have an opinion whether the cigarette industry had a cover-up? Yes or no or no opinion?

MR. RILEY: Your Honor, it's been asked and answered.

THE COURT: I'll let him answer if he can.

A I have no knowledge about the motivation of the tobacco companies, sir. If you're talking about a cover-up, I don't know the answer. I have no information about that.

Q All right. And how about whether they tried to create doubt?

A I don't know what their motivation was.

Q Well, I didn't ask it exactly in that way. If I did, I apologize. When you say you don't know what their motivation was, all right. That's fair enough.

So you don't know whether they tried to create doubt?

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A No, sir. I don't know what their motivation was. You asked if they wanted to create doubt and suggested that they tried to do something, I don't know what they tried to do. I can tell you that the public at the time was not in doubt as to the health hazards of smoking.

Q Oh, you've testified to that.

A Yes, sir.

Q And we'll discuss that a little bit coming

up in just a few minutes. Then we're going to let you go.

All right, I'm back to this. Since you testified about a coffin nail, I'm just curious. Some of these terms, a fag, a little slaver, coffin nail, and we had another one that I liked which was the devil's toothpick. Did you say that, too? The devil's toothpick. Is that one of the slangs for cigarettes?

A Yes, sir, it was.

Q Does that indicate that people know if people use the word the devil's toothpick that that means that people know that cigarettes are going to kill them?

A I think it suggests, at least it does to me, that cigarettes somehow are the work of the devil, therefore, immoral.

Q Well, does it mean that people are going

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to die from them?

A The devil is going to get you.

Q So your answer is yes?

A I would think so, sir, yes. That would be my opinion.

Q All right. So you hear people talking about the devil's toothpick, and you said, ah, that

settles it. These people know that cigarettes are 50 percent -- have a 50 percent mortality when used as intended from the word devil's toothpick; is that right?

A I think what I said was that someone who uses that phrase has in his or her mind the sense that smoking is very risky and might threaten their lives. I don't think I said anything about 50 percent.

Q And the historical method says you go and listen to people's chatter about devil's toothpick, little white slaver, coffin nail and fag, and that that determines what the people know?

A The way people talk about their lives to one another is one indication, among many, of how we learn how people or what people know and what people are aware of with reference to a specific issue.

In doing historical research about awareness concerning smoking and health, the way in which people talk to one another about that, the slang terms they use that imply mortal risk is

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useful confirmation of what we read in other things.

Q You remember the "Life" magazine with Burney, Surgeon General Burney in it?

A Yes, sir, I do.

Q How many times did he appear in "Life" magazine?

A I'm sorry, I don't know.

Q How many "Life" magazines come out? How often did they come out?

A They were weekly at one point. At that point I believe they were.

Q So you had a big stack of "Life" magazines. How many Surgeon Generals are in it for the year 1964?

A You know, I'm sorry. I can't recall.

Q '65.

A Is that how many times?

Q No, what about the year '65?

A I don't recall.

Q '66?

A I'm sorry.

Q Did you see the back of this magazine that had Surgeon General Burney in it? Did you look at the backs, too?

A Yes, sir.

Q How many -- out of a week's worth of "Lifes," how many had happy people smoking

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cigarettes on the back?

A Certainly at least one.

Q And you made no attempt to count them?

A No, sir.

Q Did you go through "Life" magazine?

A Yes, sir.

Q Did you see what's on the back?

A Yes, sir.

Q How many? I mean, roughly.

MR. RILEY: Judge, asked and answered.

THE COURT: I'll sustain the objection, Mr. Wilner.

Q Was it more than one?

A In one issue? I can't recall whether any particular issue had more than one. The back cover, as this one, was often taken up by cigarette add.

Q No, in a year's worth of "Life's" would the back covers be frequently cigarette ads?

A Yes, they would.

(Change of reporter, 9:20 a.m.)

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Q Now, let's talk about movies for just a minute. You played clips from "Thirty Seconds Over Tokyo," "From Here To Eternity," "Popeye the Sailor Man" -- do you remember playing that?

A Yes, sir.

Q Popeye was -- that was from 1948?

A I believe it was earlier than that, Mr. Wilner.

Q And somebody said -- earlier than '48?

A I believe so. I may be wrong.

Q Okay. And the funny thing was they were saying, Popeye, you've got to quit smoking, and Popeye said, I'm Popeye the sailor man -- I don't remember what he said, but that was what was -- you thought that was humorous, right?

A Yes, sir. I thought it was an example of humor of the time.

Q Popeye kept smoking though in the cartoons, didn't he?

A I don't know that he did.

Q Do you think Popeye quit; he never smoked a pipe from that time on?

A I don't know that.

Q Well, wait a minute. You picked that Popeye cartoon to show to the jury, didn't you?

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A Yes, sir. It's an example of concern about how difficult it is to quit smoking and it was selected for that purpose.

Q It was an example of a concern about how difficult it is to quit smoking?

A Yes, sir.

Q Popeye's pipe?

A Yes, sir.

Q All right. And now I asked you, well, in fact, Popeye kept smoking in front of all the children that watched Popeye for years and years and you said you didn't even know; is that right?

A Well, I don't know if that's true or not.

Q That's not important?

A I didn't say it wasn't important. I said I don't know if your statement is true.

Q Well, if it's important, why didn't you find it out?

A Important for what -- in what sense?

Q Never mind.

A It's not important to the research that I was conducting at that time, if that is what you're referring to.

Q You weren't concerned with what models children saw, even if they were as silly as Popeye?

A I was concerned that a model such as Popeye should make sure a clear expression about the

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need to give up smoking. It showed the concerned in the public at that time about the cigarette habit and the need to give it up.

Q And you think that that clip showed that Popeye had a sincere need to give up smoking, true?

MR. RILEY: Judge, I think he's arguing at this point.

THE COURT: Okay, I'll sustain the objection, Mr. Wilner.

Q The mermaid -- something about a mermaid film in 1948. The guy makes -- he says a doctor ordered me -- I've got low blood pleasure, high metabolism, bad liver, and the doctor told me to give it up, right?

A He couldn't give up cigarettes.

Q Yes. You picked out that clip?

A Yes, sir.

Q Okay. And you picked out Paul Newman with his leading lady, who I didn't recognize -- somebody can help me out maybe -- saying ordinary cigarettes give you cancer. And that was from what year?

A The ordinary kind, the kind that give you cancer.

Q Yes. Did Paul Newman smoke in the movies?

A I think on occasion he did.

Q How many people watched him smoke?

A I don't know the answer to that.

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Q Well, every time he smoked did he say, time out, listen kids, this is serious. I'm just an actor, but don't do it?

MR. RILEY: Judge --

Q He ever do that?

MR. RILEY: -- argumentative.

THE COURT: I'll sustain the objection, Mr. Wilner.

Q Did Paul Newman ever come out and say, don't smoke?

A I don't know the answer to that.

Q How many times was Paul Newman smoking in the movies?

A I'm sorry, I can't answer that.

Q All right, James Bond, or the character James Bond. He says, I've got to go get a cigarette and then they make a joke and they say, oh, yeah, well, he won't die of the nicotine, right? That's why you picked that clip?

A Yes, sir.

Q In fact, did Sean Connery playing James

Bond smoke on camera?

A I believe he did.

Q And was he supposedly the coolest thing in the world at that time?

A I don't know that.

Q Do you know what cool is, what the word cool means in America?

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A My children don't think I do.

Q Well, you're a historian. Isn't that part of popular culture?

A Yes, sir.

Q So do you understood what something is when it's cool?

A Yes, sir, I think -- I hope so.

Q Was James Bond cool?

A I think he would be considered cool, yes.

Q And James Bond smoked?

A Yes, he did.

Q So it was cool to smoke?

A Certainly James Bond was cool and that was part of his image.

Q And how much influence does James Bond being cool and James Bond smoking have upon people's perception, any at all?

A I don't know that. I don't know how to

measure that.

Q That's just not something you looked at at all, is it?

A Well, sir, that's a -- sort of a field of psychology, I guess. I don't know how to measure the impact of any particular piece of information.

The only thing as an historian I can say in response to that is that is common knowledge of the danger of cigarettes persisted despite the fact

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of what you're saying about Sean Connery or James Bond.

Q All right. Have you made any effort to determine how many screen actresses and actors have smoked in the movies?

A No, sir.

Q And do you have any interest as an historian in that?

A Not in the precise number, sir.

Q Well, I didn't ask you -- again, maybe my -- I didn't ask you exactly about the precise number. I just -- if you take the question about the precise number and say just generally, have you tried to familiarize yourself with how common the use of cigarettes is among heroes and heroines and role models in Hollywood?

A Well, I guess it certainly is common that people smoke in films.

Q Well, just people smoke or important people smoke?

A Among the people who smoke would be -- I don't know what you mean by "important people."

Q How about James Bond? Important for people's perception of role models. Was James Bond a role model to little boys?

A Yes, sir, but there are role models also who did not smoke.

Q And historically the question is, does the

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fact that role models smoke in film play any role in your historical analysis?

A In trying to understand what the public awareness of the dangers of smoking were, it's just as important to me that role models do not smoke --

Q Okay.

A -- as that role models do smoke.

Q Fine. So you know then which role models do and which role models don't?

A No, sir, but what I will testify to is that people were confident about the health risks of smoking, even though they may have been exposed to role models who did smoke and role models who didn't

smoke.

Q So I just asked you whether it was important to you whether role models smoked, and I couldn't tell how you answered.

A It's important to me to try and see whether it's reflected in common knowledge.

Q Do you know which role models smoked?

A Well, James Bond would be one.

Q Well, you've looked through the film clips, haven't you?

A John Wayne did some smoking, too.

Q I'm just trying to see -- when you did this project you went to somebody who said here is film clips about cigarettes and popular culture,

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right?

A I went through film clips which were evidence or examples of popular culture terms on how people viewed smoking. I did not make a systematic study of film.

Q We talked about Lucille Ball. Did she smoke in real life?

A I believe she did.

Q Ann Bancroft, did she smoke in the movies?

A I don't remember that.

Q Tallulah Bankhead, did she smoke in the

movies?

A I believe so.

Q In real life?

A I don't know.

Q You know, the information is available, isn't it, who smoked in the movies and who smoked in real life?

A I don't know that.

Q Ann Margaret, did she smoke in the movies?

A I don't know.

Q Did she smoke in real life?

A I don't know.

Q How many films -- did you only see the 12 films that you talked about, six of which you don't remember, or were there others that you looked at to see whether important people were smoking?

A In seeking out -- I didn't really study

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films to see whether important people, as you say, were smoking because I was mainly concerned with how people talked about it, how people understood the health hazards of smoking. I did not do a comprehensive analysis of the number of role models who did or did not smoke.

Q Let me show you --

MR. WILNER: This is an exhibit we've

given you.

MR. RILEY: Judge, may I've a moment to confer with, Mr. Wilner?

THE COURT: All right.

(Discussion off record)

MR. RILEY: May I have another moment, Your Honor?

THE COURT: Yes.

Q Let me hand you a document called "Famous Actresses and Actors Who Smoked In Films." Have you seen it? Have you seen that document before?

A No, sir. Do you have a cover for it?

Q Do you know whether this -- I don't know what you mean by -- it's in a cover.

A No, no, I mean the cover of the original document.

Q That is.

A It comes out like this?

Q Yes.

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A No, I've never seen this.

Q Do you have access to the Internet?

A I'm not very good at it.

Q Do you have access to it?

A Yes, sir.

Q Isn't it part of the research that an

historian is expected to do these days?

A It depends on the subject they're searching. It certainly wouldn't be very relevant to know what people knew in the 1940s and '50.

Q Because there are no sources of historical information on the Internet?

A No, sir, because people in that time did not have access to the Internet.

Q Well, if you could obtain from the Internet a list of thousands of actors and actresses in famous films who smoked, don't you think that would have some historical importance to you to look at how just much there's been?

A It might, if in fact I had a weight of evidence from a variety of sources that suggested that was significant to understanding what people knew about the health risks of smoking. Then I would have made an effort to find that.

It was not my judgment based upon my years of historical research that this list would have altered or effected what people knew in those days about the dangers of smoking.

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Q So let me get this straight. Your testimony is as an historian that when people see role models in the films that does not have an

effect?

A No, sir, I did not say that. If I did, I misspoke and I apologize. I do not believe I said that.

I said that there were role models who did not smoke and there were role models who did smoke may have had effect on particular viewers. I don't know about an individual.

Q Thank you.

A What I can say is that the effect on common knowledge did not alter the perception of the dangers of smoking.

Q In your opinion?

A In my opinion.

Q Okay. Now, let's follow up with two more things. Remember we asked you yesterday when we pointed out pieces of the Miami Herald which had information from the TIRC in them. You said -- and I want to make sure I get you straight. You said, well, they were just a drop in the bucket compared to the overall amount of news that was coming, or words to that effect, right?

A Yes, sir.

Q So you think that the influence of the

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TIRC on the news was small?

A I don't think I tried to -- I don't think I made a judgment about impact or influence. What I said was, that the appearance of articles, such as the one that you highlighted, was a tiny minority of the total number of articles available to read.

Q Okay. Well, then, I suppose you've counted; you've gone through maybe a typical year and counted the number of TIRC articles and compared them with the number of non-TIRC articles for cigarettes in that year, right?

A I have done it, but not systematically. I can't give you a draft with numbers of A and B.

Q Okay. Well, maybe we can do that for you. Let me -- let's see if we do this -- how is the year 1960? Is that a good year? Is it?

A Yes, sir.

Q Okay.

A As good as any other, I guess.

Q All right.

A I mean, without having done it for all years, I don't know that it's a typical year.

Q Oh, okay. Well, we'll do another year if you want. Let me put up a chart that we prepared and you can tell me whether you agree.

Looking at just your data from 1960,

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'59 -- zoom it back out a little, Ginny, please -- '59, '60 and '61. I want you to confirm this. Take whatever time you need.

In 1960, which is the one you have, there were 70 total cigarette stories from the Miami Herald. Eighteen of those were not related to disease, so they were something about cigarette tax or whatever, so we subtracted those. Two were not related to cigarettes at all. They were related maybe to disease but not cigarettes, so we subtracted those. Forty-four then were total cigarette- and disease-related and 31, or 71 percent, had TIRC influence.

I want to see if you can confirm or deny that.

A I would simply say that as an historian I would be uncomfortable with the word influenced because it suggests something that I can't prove or disprove and is an allegation I would not make.

Q Okay, fine. Then let's not talk about influence. Let's just say that in 31, or 70 percent, of the Miami news articles that concern cigarettes and disease of that year that there was at least a position expressed that cigarettes might not be dangerous?

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A Yes, sir.

Q Okay. So of the -- and do you have any reason to dispute that for 1959 there were 64 total stories noted, of which 22 were not disease-related, six were not cigarette-related, giving a total of 36 that were cigarette- and disease-related, of which 19, or 52 percent, had something in there that said, ah, but it might not be true. Do you disagree?

A Well, not having gone through your count, you are asking me to take your evaluation as if it were the same as my own. And I'm not sure that you're as a trained historian as I, so I'm not sure whether I should go along with your categories.

Q Well, where is your own?

A Well, I think you're headed at least in the direction that I would have gone on my own. First of all, unfortunately from these notes you have, in 1960, 70 articles that are cigarette stories. In fact, there were approximately 200 more that were not selected for summary.

Q Oh, so there is other stuff that you didn't show us?

A No, sir. There is other stuff that wasn't summarized.

Q Why not?

A Well, perhaps because it didn't seem to be representative or it didn't seem to be significant or it didn't seem to be as useful as others.

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Q Okay. So of the 70 that you picked as representative and useful, you can't deny that 70 percent of the ones that were related to cigarettes and disease had information in there that could go either way?

A Oh, no, not at all, and I may have chosen those precisely because they had information on various sides of a story.

Q And in '61, out of 46 total stories that you selected, 20 were not disease-related, seven were not cigarette-related, 19 -- giving a total of 19 that were of total cigarette and disease, of which 12, or 63 percent, had something in it, whether influenced by TIRC -- we'll talk about in a minute -- but they had something in it that said cigarettes may not hurt you, true?

A According to that chart, yes.

Q Okay. You don't have a chart that you created for us, do you?

A No, sir, I don't.

Q Okay. One second. Now my question is, of the ones that have the caveats, of the ones that

say, oh, but cigarettes may not hurt you, I asked you are they the result of the influence of the TIRC. And you said, what, you don't know?

A I said I do not know.

Q Let me -- now, let me show you another

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one. Would the TIRC be an organization that was very concerned with how the news coverage was going?

MR. RILEY: Your Honor, I object. No foundation.

THE COURT: I'll allow it if he can answer it.

A I have no basis for judging the motivation of the TIRC.

Q Well, I mean, did they count? Did the TIRC count how effective they've been at getting their message out?

A I don't know the answer to that.

Q Well, when you evaluate history, don't you want to look at what the people who made the history say about how they were able to do it?

A Well, in this case the people who make his history are ordinary consumers and ordinary people, not leaders of an industrial group or kings or queens. And so in social history we're trying to find out what fairly anonymous people have to say.

So, no, sir, I would not. That would necessarily -- it would be relevant if it became part of popular awareness.

Q Okay. Well, let's see if somebody who had reason to know has counted the favorable versus unfavorable articles for a period of time back in the '50s. Let me show you Exhibit No. -- whoops -- tab -- Exhibit No. -- what is the exhibit number on

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Hill, 28? 28, tab eight, a Hill & Knowlton document.

Do you know the story of John Hill and the Hill papers?

A No, I'm not familiar.

Q Do you know what the Wisconsin Historical Society is?

A Yes, sir.

Q What are they? What is it?

A What is it?

Q Yes.

A The Wisconsin Historical Society is the state society of history and historians in the state of Wisconsin.

Q Do you know who John Hill was of Hill & Knowlton?

A No, sir.

Q Do you know that he donated his papers to

the Wisconsin archives?

A No, sir.

Q Do important people often donate -- important people often donate their papers or their internal correspondence to some organization to maintain them for the public good?

A That is often the case.

Q Do you know that he said that they're to be sealed for 25 years and then they can be opened?

A I did not know that.

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Q You were not -- of course, had anything to do with the John Hill papers --

A No, sir.

Q -- in your research?

A No, sir.

Q Do you know they were available to you?

A No, sir.

Q From the TIRC in 1954 do they document the number of favorable versus unfavorable stories that they were able to place? Twenty-four unfavorable stories tobacco critics' publicity versus 50 favorable stories including serials, script, New York Syndicate and so forth. Did you know that according to their own count they were running two to one in favor of TIRC-planted editorials?

MR. RILEY: Objection, Your Honor.

THE COURT: I'll sustain the objection to the form of the question.

Q Did you know that according to the TIRC's own tally they were running two to one in efforts to put news into papers?

MR. RILEY: Objection, Your Honor.

THE COURT: I'll sustain the objection.

MR. WILNER: All right.

Q Did you know they were running two to one on favorable versus unfavorable stories?

A I did not know that. I read it here.

Q Is that -- well, you said you went out and

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looked at the stories themselves, right?

A Yes, sir.

Q Well, were they wrong? Was TIRC wrong here? Were the unfavorable stories really 50 and the favorable -- I'm sorry. Were the favorable stories to the TIRC really 50 and the unfavorable only 24?

A Well, that's their opinion of what's favorable to them.

Q And you disagree?

A I don't know. I didn't go back to the articles for that single purpose so I can't make --

I can't offer a count that's different or similar. The TIRC has a sense of what's favorable to it, of which I'm not aware.

Q Well, did you go back and look at the 54 articles?

A I went back and reviewed the newspapers I have indicated for 1954.

Q I thought that you -- I'm sorry.

A I don't know that I looked at all of the ones mentioned here. I don't know where they appear.

Q I thought that you were basing your testimony on the fact that there was such an overwhelming number of, in this case, unfavorable articles?

A Over time, yes, sir.

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Q But not --

A But I said -- excuse me. I did not refer to favorable or unfavorable to TIRC. I was talking about articles that have to do with the relationship with smoking and health. And I referred in my testimony to the fact that there were more articles in the newspaper about smoking and health that indicated health hazard than there were articles or than there was information to the contrary. And, I'm sorry, but I don't think this count has much to

do with that.

Q You don't think that the count of how many favorable articles which say that the cigarettes are not harmful versus unfavorable articles has much to do --

A Well, I don't know because I don't know what favorable and unfavorable means in this context. I don't know the context of this document. You've plucked a single document out of context --

Q Okay.

A -- so I don't know precisely what it means.

Q So you need to know what context TIRC used when they said favorable or unfavorable stories, right?

A Yes, sir.

Q Okay. So, let's see if we can do that.

What was the purpose of the TIRC?

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MR. RILEY: Judge, I think this was covered yesterday. I object, asked and answered.

THE COURT: I'll sustain the objection.

Q When you say you don't know what the context was, do mean you don't know what the TIRC was all about?

A No, sir. I mean I don't know the context

of that list. I don't know what those individuals mean. I don't have any reflection of it in the public press so that I can see what it has to do with discussions of those issues.

MR. WILNER: It's in evidence. We need to know which one. 39 of what tab. Tab 44.

THE COURT: What is that, Plaintiff's 39?

MR. WILNER: No. That one is too confusing to explain. Let's do another one.

Oh, okay. Well, that's all right.

Q Do you remember yesterday I asked you what a news release was?

A Yes, sir.

Q And did you say you knew about news releases or you didn't?

A I said a news release, as I understand it, is information that somebody gives out in order to have it placed in the public media.

Q Because remember yesterday you said, when we were asking about how Clarence Cook Little came

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to be quoted in an article, and you said, well, I guess they just called them up and said, Clarence, what's your opinion about this? Do you remember that?

A I don't believe I said that.

Q You didn't say that?

A I don't believe I would have said it that way. It doesn't sound like something I would say. If I did, I accept your -- are you quoting me?

Q Words to that effect.

A I think, if I understood the context to which you refer, I believe what I said -- with reference to a correspondent for the Miami Herald, you asked me how he -- he, referring to that individual -- got the information for the article. And I suggested that he might have gone out to call people to get their opinions in order to write his article. Is that the same -- are you referring to the same context?

Q Sure. You think he went out and called Clarence Cook Little?

A Among others, I guess.

Q All right. Take a look at the news release in front of you. Do you recognize things like that?

A I have not seen this document.

Q Do you recognize things like that? Have you seen news releases before?

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MR. RILEY: Judge, I'd like some identification, please.

MR. WILNER: Oh, I'm sorry. I'm sorry. My mistake.

THE CO9URT: What is it from if it's in evidence?

MR. WILNER: It's a Tobacco Institute news release.

THE COURT: Well, I mean, is it in evidence, Mr. Wilner?

MR. WILNER: That's what we're trying to figure out, Your Honor. I think it was in the bunch --

THE COURT: I need for it to be figured out for the record, okay.

MR. WILNER: All right. Well, right now I'll assume that it is and we'll just use it for cross.

MR. RILEY: Judge, can I get a copy?

THE COURT: Do you have a copy, Mr. Wilner?

MR. WILNER: I think he has it.

THE COURT: If you could tell him where he has it.

MR. WILNER: We will. We will.

THE COURT: All right. Why don't we take the break at this point.

MR. WILNER: Okay.

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THE COURT: It's about ten minutes till, ladies and gentlemen, and if you're in the jury room at ten minutes after we'll start up.

THE BAILIFF: Recess until ten minutes after ten.

(Jury exits; recess)

(Change of reporter, 9:50 a.m.)

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THE COURT: Dr. Tulchin, come on up and have a seat, please.

THE WITNESS: Yes, sir. Thank you.

THE COURT: Mr. Wilner, I'm not trying to cut you off, but about how much longer do you think you have?

MR. WILNER: Oh, 35 minutes, maybe 40.

THE COURT: How long do you think you have?

MR. RILEY: I don't think I'll be long, Your Honor.

THE COURT: I don't have any idea what that means, Mr. Riley.

MR. RILEY: Well, maybe half an hour, 40 minutes.

THE COURT: Thank you.

Does that throw you behind schedule?

MR. NYHAN: No, Your Honor, we've got -- out next -- oh, could we have a word at side bar?

THE COURT: All right.

Do you need the court reporter, the stenographer?

MR. NYHAN: Yes.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Your Honor, the

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Brown & Williamson Tobacco Corporation at this time moves for a mistrial on the basis of Mr. Wilner's comments, which raise some issues that we missed coming into the trial. We think that it's inappropriate. It's unfairly prejudicial. We have an Asian lady on the jury. We think that Mr. Wilner has tried to associate the CTR and Clarence Cook Little with issues of race, and we think that's unfairly prejudicial, and we think it was intended to prejudice the jury. There was no basis for those remarks. There was no basis for those questions.

THE COURT: What did he say? I mean --

MR. RILEY: He made a comment about -- I think his comment was, wasn't the eugenics movement involved with racial quotas, or something to that effect. I'm not sure of the exact words, but he used words to that effect, Your Honor. And it's unfairly prejudicial and inflammatory.

MR. WILNER: It's true, too, and it's true about Clarence Cook Little, and it's true that that's why they hired him, and that's been our position from the start. We've always announced it.

THE COURT: That he was a racist?

MR. WILNER: Absolutely. But I didn't call him a racist, but he was in eugenics.

THE COURT: What does it have to do with this trial?

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MR. WILNER: The constitutional hypothesis is scientifically invalid. We have been maintaining that from the start, that it was. And we've heard all about the constitutional hypothesis.

THE COURT: I didn't pick up on it. I doubt Ms. Sapen did.

MR. RILEY: Judge, Mr. Browning alluded, too, he said that the question was -- that Mr. Wilner put, was that the eugenics movement led to the imposition of racial quotas. And we think that's extremely inflammatory.

MR. WILNER: It's a historical fact.

THE COURT: I'll deny your motion for a mistrial. However, I would direct you to stay away from that.

MR. WILNER: Absolutely.

THE COURT: And if you want to present that, you need to proffer it outside the hearing of the jury.

MR. WILNER: That's fine.

MR. NYHAN: I've got one other question,

Your Honor.

THE COURT: All right.

MR. NYHAN: Plaintiffs have changed their position on what I thought we had was our agreement on witnesses. I'd just like to know what the plaintiff's position is with respect to invoking the

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rule.

MR. WILNER: Well, I haven't changed my position.

THE COURT: What do you mean? I don't know what you're talking about.

MR. NYHAN: I thought we had an agreement before trial that there would be no exclusion of witnesses. That was my understanding. And then yesterday --

THE COURT: Well, I agree that that was the understanding, and I don't know of any witnesses that have been excluded. I think when you have a witness on the stand, though, and you're arguing a particular point, that that witness can be excused temporarily, but go ahead.

MR. NYHAN: This is a different issue.

THE COURT: I know.

MR. NYHAN: Dr. Weigold came in yesterday to sit in the back, and Mr. Wilner asked that he be

excluded. I did exclude him. Now, again, I just want to know --

THE COURT: Well, he didn't ask -- nobody asked me, so, I mean --

MR. NYHAN: We've been trying to resolve as much as we can without bringing it to you, but do I have keep all of my witnesses outside, that's the question?

MR. WILNER: Yes. Our position is we

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jointly believed that we didn't care if their
witnesses saw our witnesses. They didn't care,
evidently, that our witnesses saw our witnesses. I
do care whether their witnesses see their
witnesses. That's all, so....

THE COURT: Well, is that your
understanding? Because I asked pointedly if anyone
wanted the rule invoked, and you both said no.

MR. WILNER: I did not for my witnesses.
I do for his.

THE COURT: Well, see, I didn't receive
that caveat.

MR. WILNER: I didn't think it was
necessary.

THE COURT: You want it invoked only for
their witnesses, not your witnesses?

MR. WILNER: Right. I think you can
invoke it at any point along the trial.

THE COURT: I agree with that, unless you
have an agreement for the other side not to do that,
Mr. Wilner.

MR. WILNER: It wasn't my intent to do
that.

THE COURT: Well, what was the agreement?

MR. NYHAN: You know, I don't really
care. I just want you to know that if the witness
is in here, it will just speed calling the next

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witness. If the witness has to stay outside, it just means we'll just have to take a break and it will slow us down. That's my only concern, is that we move at a speed --

THE COURT: Well, I don't have a problem with that, if he's right outside or in. I do have a problem if you think you had an agreement and --

MR. NYHAN: I'm not going to debate that.

THE COURT: And I'm not going to get into, Mr. Nyhan. I'm just saying that that would be the only way I would enforce it. It would have been my position to exclude all of the witnesses who hadn't testified anyway, but neither of you wanted to do that, so....

MR. WILNER: Let me see if I can solve this. Because Mr. Nyhan has suggested that it was his understanding that we did have an agreement for the whole trial, I will rescind any objection I have, because I don't want anyone to suggest --

THE COURT: Well, I'm not suggesting --

MR. WILNER: No, no, I know. But I'm doing it on my own.

THE COURT: All right. But I want the record to be clear that I'm not suggesting that. I have no idea what you-all's agreement was.

MR. WILNER: Let me state that I wasn't being cute, but my feeling is that the rule is a continuous thing. In other words, you go along

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witness by witness, and when you finally invoke it or if you decide to, you can. But be that as it may --

THE COURT: I think you are technically legally correct.

MR. WILNER: Absolutely.

THE COURT: If you don't do it as the first of the trial, you haven't waived that. But that's why I asked you if you had an agreement, because I do have a personal feeling that you can't say, yeah, let's don't invoke the rule and then when

I get to his witness, say, but wait a minute, but now we're going to do it.

MR. WILNER: Right. That's right. And if he thought that that happened, I concede. That's fine.

THE COURT: What I'm saying is, if you can't work it out among yourselves --

MR. WILNER: We've worked it out.

THE COURT: Okay.

(Side-bar conference concluded: Proceedings resumed before the jury)

THE COURT: Are you ready to proceed, Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Riley?

MR. RILEY: Yes, Your Honor.

THE COURT: Bring them in, please.

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(Jury enters courtroom)

THE COURT: All right. Mr. Wilner, whenever you're ready.

MR. WILNER: Yes, Your Honor.

Q All right. Dr. Tulchin, remember we just showed a comparison by the TIRC of how many favorable versus unfavorable articles, and you said you didn't know what they meant by favorable and

unfavorable?

A Yes, sir.

Q Because you didn't know the context?

A That's correct.

Q All right. Let me show you in Exhibit No. 28, Hill, Item No. 3 -- Tab No., called Hill & Knowlton preliminary recommendations for cigarette manufacturers, dated December 24th, 1953. And let me rapidly go to page 4 to see if we can agree on what their objective was. Public statement by cigarette smokers -- cigarette makers. Cigarette makers.

The first public statement of the committee should be designed to clarify the problem and reassure the public that the industry's first and foremost interest is the public health. And there is no proof that the claims which link cigarettes -- link smoking and lung cancer. And the industry is inaugurating a joint claim to deal with

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the situation. And it talks about how the statement should be distributed.

Does that refresh your recollection about whether the plan of the TIRC was to reassure the public?

A I didn't stay that I had a recollection,

sir. I said I didn't know what the plan was.

Q Does that -- or does that -- or does this document then give you information to the effect that the plan of the TIRC was to reassure the public that there was no proof of the claims which linked smoking with lung cancer?

A That is what this says, yes.

Q Okay. Then would you understand then that a favorable article to this plan would be one that does reassure the public that there's no connection between smoking and lung cancer?

A No, sir, not necessary.

Q Not necessary. You used the word "necessarily."

A I said not necessarily.

Q Well, I didn't say necessarily. Would you think that it's more probable than not that an unfavorable article would be something that does say that smoking causes cancer, and a favorable article, if you have that plan to reassure the public, would be something that does reassure the public?

MR. RILEY: Objection, Your Honor. No

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foundation; calls for speculation.

THE COURT: I'll sustain the objection, Mr. Wilner.

BY MR. WILNER:

Q Item No. -- same exhibit, Item No. 18, again, from the TIRC. This is 1955, so this is a year -- when did the -- when was the TIRC formed, sir?

A I believe it was formed in 1954. I'm sorry. I didn't know you were directing that at me.

Q Well, I'm sorry. I didn't mean to turn my back to you.

A No, I was reading.

Q All right. And was there a meeting at the Plaza Hotel with the people from the cigarette industry?

A I don't know that.

Q Okay. The -- what I want to read here -- this is 18? This is page 2? Oh, I'm sorry, page 1. I'm sorry. The Big Scare. The Big Scare.

Here. The first big scare continues on the wane. Do you agree that the big scare of '54 was on the wane by '55?

A I don't know what they mean by "big scare."

Q You don't know about the cancer scare in 1954 that you talked about?

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25 A I don't believe I focused on a scare, I

1 don't think I used that term, or focused on a single
2 year. What I remember saying was that the American
3 people became deeply concerned about cancer, and
4 lung cancer specifically, through the 1950s and
5 after.
6 Q And this says that it's on the wane. What
7 does a wane mean?
8 A On the wane means that is it declining.
9 Q There is much general awareness of the big
10 "if" factors involved.
11 And does that indicate anything to you?
12 A Well, it's the opinion of the author of
13 this document, which I have not seen, that the
14 scare, as he puts it, or she puts it, is declining.
15 Q Even -- on page 2 -- no, maybe it's still
16 page 1. Treatment of the cigarette health issue in
17 public media -- where am I reading at?
18 Treatment of the cigarette health issue in
19 public media continues to improve from the TIRC
20 point of view.
21 Treatment of the cigarette health issue in
22 the public media continues to improve from the
23 Tobacco Industry Research Committee point of view.
24 So does that indicate that a press
25 coverage was tending to reassure the public?

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A No, sir, it does not. It means that the author of this document thought that from his or her point of view the situation was improving.

Q And the situation was improving from what perspective?

A From their perspective.

Q Which was to reassure the public, right?

A Only -- no. What it means is that in their reading things are getting better for them.

Q And them --

A And I disagree with that.

Q Oh, you don't think they were even right?

A I disagree with that statement, yes, sir.

Q So things weren't getting better, but they were thinking they were?

A Apparently.

Q So they didn't know?

A I disagree with that evaluation of the public records. I don't know what they read to make that, sir. I don't know what studies they did to make that statement. All I can say is on the basis of my reading of the historical record, I would say that at no time during the period in question, 1950s, was the concern by the public of lung cancer declining.

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Q Right. And these people wrote this back when it happened, right? These people were there, right?

A Yes, sir.

Q So these people were Hill & Knowlton. And who was Hill & Knowlton?

A They were the public relations firm.

Q And John Hill was like one of the preeminent public relations people in the country, wasn't he?

A Yes, sir.

Q And he wrote back when he was immersed not only in the printed media but in the entire scene in 1955, right?

A But he was not a historian.

Q But he lived then, right?

A And he had a very narrow point of view.

Q He was narrow?

A He was an individual. We don't focus on individuals as we try to find out what public awareness was, because we can't know that any single individual represents the entire population.

Q And his opinion, having evaluated exactly what you claim to evaluate and living there in the time and seeing the whole picture, is totally

different from yours?

A Sir, there's nothing in this document --

MR. RILEY: Objection. It's been asked

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and answered.

THE COURT: I'll overrule the objection.

A There's nothing in this document that tells me that its author reviewed the materials that I reviewed.

Q Positive stories are on the ascendancy. Positive stories are on the ascendancy. What's the ascendancy?

A That is -- what it probably means is an increase in the number.

Q You don't agree with that either?

A It doesn't jive with my reading of the entire historical record.

Q They may not always be in places we would like to see them and they may not always say the things we would like them to say, but at least they are now showing up and they do cast doubt on the cigarette attacks. A year ago attacks predominated and they were generally immoderate. Do you agree with that?

A Sir, you say the author of this is Mr. Hill?

Q Uh-huh (affirmative).

A Mr. Hill seems to think that they rose and fell in the pattern that he describes.

Q Okay.

A My position, as I've tried to say, is that

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the public awareness of the dangers of smoking was profound and widespread during this period. I have not counted all of the articles to which you refer. I cannot come up with statistics and conclude -- make a conclusion by statistics.

Q You didn't count them and you didn't live back then; we've established that.

A Well, as a matter of fact, I am that old. Sorry.

Q You're not basing your opinions, though, on your observations of things in 1955 firsthand?

A I would hope my observations at least were consistent with what I'm finding in the historic record. If they're not, I'd like to find out why, that would be true, to see if I was an ordinary person, a typical person.

Q Well, let's see. Let's look at 24. Page 3 -- oh. The title page is public relation's proposals for the tobacco industry on page 3 to 4. On the bottom of page 3, numerous publicity attacks

being prepared for various media have been tempered or avoided. The 1955 Ed Murrow shows "Life" magazine features and the public affairs committee pamphlet are major -- are major examples.

Do you see that? Do you see that?

A Yes.

Q Do you agree?

A I'm sorry. Examples of -- may I see

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the --

Q Examples --

A -- the earlier statement?

Q That's what it says.

A No.

Q Do you agree that -- that -- I'm sorry. Go back to --

A Yes. You see it's --

Q Do you agree that numerous publicity attacks being prepared for various media were tempered or avoided by the TIRC?

A That's his point of view from his opinion.

Q Do you agree?

A I would say that if they were tempered or avoided, that certainly was not the public impression.

Q Let's go to the next. Doctors and

scientific groups -- the next page. Doctors and scientific groups have been reached through talks by Little, Eckert, Scientific Advisory Board members and others, not directly connected the TIRC.

Did you look at how the influential -- or the -- did you look at whether doctors were influenced and what information they were receiving that was specific to doctors?

A I did not evaluate mailings to doctors. Is that what you mean?

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Q Well, let's see what the TIRC said. They've been reached through talks by Little -- talks by Little, Eckert, Scientific Advisory Board. How about those talks? Did you get the text of them?

A If they appeared in the public press, I would have seen them.

Q How about if they didn't?

A If doctors advice appeared in the public press, I saw it. I believe in my testimony I referred to an article by a doctor in the "Miami Herald," for an example.

Q All right, sir. You don't know what these people were telling the doctors in talks?

A No, sir.

Q All right. Quickly, No. 28. And, again, from Mr. Brady from Hill & Knowlton on page 1, historically -- he uses the word historically -- it would seem that the 1954 emergency was handled effectively.

Now, as a historian, what does he mean?

A Well, as a historian I would be very reluctant to interpret a single document out of context.

Q Well --

A As for my interpretation as a professional historian, one of the first things you learn how to do is not interpret the past from a single source.

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Q And have we not seen a series of documents from the John Hill papers, not just one?

A Well, we've seen as many as you'd like. We've seen five or six, but they don't represent a minuscule fraction compared to the thousands upon thousands of pages that -- of information that are accessible to us.

Q And this is 1962, so he's writing up in 1962, and he's saying that historically it would seem that the '54 emergency was handled effectively.

And you know what he's talking about,

don't you? What was the emergency?

A What is the emergency?

Q You don't know?

A No, sir.

Q You don't understand that the emergency was that the cigarette industry's sales were threatened by the reports of cigarette and cancer?

A No, sir. That's not a subject that appears frequently in that year.

Q Okay. So when he says "emergency," you just don't know what he's talking about?

MR. RILEY: Judge, it's been asked and answered.

THE COURT: Okay. I'll sustain the objection.

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BY MR. WILNER:

Q Okay.

Now, if we assume that the emergency was handled effectively, that brings us back to our -- to the news release that I was about ready to ask you about, and -- but I lost it.

MS. STEIGER: It's right here.

MR. WILNER: Okay. Thank you.

Q So let me show you this real quick.

MR. WILNER: There was one previous to

this, 57.

MS. STEIGER: Here is it?

MR. WILNER: Thank you. That's 64. I'm sorry.

MS. STEIGER: 57.

MR. WILNER: 57. All right. It may be in there, 57.

MS. STEIGER: October 30th?

MR. WILNER: Yep. Just for example -- help me out, 57.

MS. STEIGER: It's Tab 26.

MR. WILNER: Tab 26, okay.

Q All right. And this is in -- let's state the evidence where this is the from, Tab --

MS. STEIGER: 539.

Q 539. Let's look at this just for a second. This is from Tobacco Industry Research Committee. That's TIRC, right?

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A Yes, sir.

Q For release Wednesday, October 30th --

MR. WILNER: Is this the one? There's one that's the same day. Yeah, okay.

Let me make sure we have the right one. I've got it. It's Tab 25, and I've got it. The reason you couldn't find it is I had it.

MS. STEIGER: The benzopyrene?

MR. WILNER: This one.

MS. STEIGER: Okay.

Q Okay. Let me show you this one. This is the -- for immediate release Monday -- this is from Hill and Knowlton, 150 East 42nd Street, New York, New York. That's that same bunch that we talked about with John Hill, right? You know who they are?

A Yes, sir.

Q Okay. For the TIRC. For immediate release. Scientists comment on benzopyrene report. The question of the presence of benzopyrene --

MR. WILNER: Is this the one with the newer -- I'm sorry. I'm trying to get the right one. Okay. Now we have it. All right. Let me go on to something else while -- I want to get this together.

See if you can find the one that we're talking about because now I'm totally confused.

Thank you.

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Q All right. I'll go on because I'll come back to that. I've only got about ten more minutes. Okay.

MR. WILNER: Is that the one we're looking for? Where's the news article? Okay. Thank you.

Q One more try. I'll hand you this. This is -- it says, for release in a.m. of Monday, December 16th, 1957.

A Excuse me. Do you want to hand it to me? I'm sorry. You said you wanted to hand it to me.

Q Yeah, I will.

MR. WILNER: Have we got another one?

Q Well, follow along. I'll make it easy to read.

MR. WILNER: That's the one. Okay.

Q For release in a.m. of Monday, December 16th, 1957. Research program throws doubts on smoking charges from the TIRC. For release in a.m. of Monday, December 16th.

Do you know what that means? Do you know what a news release is?

A Yes, sir, I do.

Q Where does it go?

A Generally speaking, it's sent out to representatives of the media.

Q Why is it done?

A So that the information in it would be available to people in the media.

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Q And are there organizations that just send out this kind of information?

A Many organizations do.

Q Including the TIRC?

A Yes, sir.

Q Does it get picked up?

A That, I don't know. I would assume so. I can't tell you when or where.

Q Okay. Let's look at 1957 from your notes, or your associated notes, December 17th, which is the day after, right? And this is in the "Miami Harold": Scientist finds no proof smoking is caused -- is cancer cause.

Dr. Clarence Little of the TIRC said in his annual report that there wasn't any proof that cigarette smoking caused cancer. Instead, Little suggested smoking could be a symptom of neurohormonal imbalance, which may be a cause of many illnesses, including cancer, et cetera, et cetera.

Now, have you ever compared the news releases with the actual articles?

A No, sir, I have not.

Q Is it common practice for these news releases to be picked up by newspapers like the "Miami Harold"?

A It is done. Whether -- I wouldn't say

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that it's -- I haven't studied the practice, so I can't say whether it's common or not, but I know that it is done.

Q How much of the news that the "Miami Herald" reported was, in fact, news that they were fed by the TIRC?

A I can't answer that.

Q Okay. One second.

Okay. You talked -- part of your testimony was about schools, school curriculum, right?

A Yes, sir.

Q Now, you said -- and let me see if I get it right -- the curriculum in Florida in 1960 past 1964 said -- incorporated things about the Surgeon General's report?

A Yes, sir.

Q Did you look at -- and, of course, you know that -- that Mr. Maddox was 34 years old and never went to school in Florida, right?

A Yes, sir.

Q Okay. But did you look at some general --

MR. WILNER: Let me have the -- did you give them to me?

MS. STEIGER: Yes, I did.

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Q Okay. Did you look at some text in -- from that period in general to see just what the -- what exactly was being said about cigarettes at the time? Did you?

A I looked at some Florida textbooks, yes, sir.

Q Well, textbooks that are prepared for use with the schools, they're not always just listed as Florida textbooks; some of -- many of them are published by national concerns, right?

A Yes, sir.

Q Okay. And your -- are you --

A I assume so.

Q You assume so?

A Well, I don't know for a fact that all of the publishers of all Florida textbooks are national firms.

Q Well, I didn't ask that. What I said was that many of the books used in Florida, or Maryland for that matter, are published by national firms, right?

A I believe so.

Q Okay. And you're familiar with Scott Foresman and --

MR. RILEY: Your Honor, may I see that

before he puts it up?

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THE COURT: You may.

MR. WILNER: Sure. Here's you another one.

MR. RILEY: No objection, Your Honor.

THE COURT: All right.

BY MR. WILNER:

Q You're familiar with -- did you look at school curriculum in general, conduct any kind of scientific study of it?

A What's a scientific study?

Q Well, a historical study, whatever you call it.

A Okay. No, I used historical studies done by a colleague at the University of Alabama, who had surveyed school texts in states, in different states.

Q With what purpose?

A Presumably interested in learning what people taught in schools about smoking and health.

Q Did he do it because he was interested or do it because he was paid by the cigarette industry?

A Well, that was the field of his research throughout his career. He may or may not have been paid. I don't know.

Q Well, did he show you this text from Scott, Foresman & Company called, You're Growing Up, from 1954?

A I don't know that textbook.

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Q You don't know the textbook. You mean he didn't share this one?

A I don't recall seeing that either from Maryland or Florida.

Q You're familiar with Scott, Foresman & Company, though, right?

A Yes, sir, I know them.

Q National publication?

A Yes.

Q Okay. Are you aware of what they were saying about cigarettes in 1954?

A No, sir. I don't know that that text was used in any particular place. Do you know where it was used?

Q Any particular place?

A Yes, sir.

Q Do you think it was published by Scott, Foresman & Company and wasn't used?

A We don't -- I don't know where it was used. If you tell me, I will know.

Q All right. It was used in Florida,

Doctor.

Are tobacco and alcohol harmful to the body? Doctors are still not in complete agreement as to the full extent of harm in tobacco. Some doctors and research workers think that smoking is fairly harmless to most healthy adults who smoke

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moderately, but all authorities agree that smoking is harmful to growing boys and girls.

Do you see that?

A Yes, sir.

Q Is that typical of what was taught to kids in the '50s?

A Well, certainly the final statement is that all authorities agree that smoking is harmful to growing boys and girls. As I mentioned in my testimony, people for many, many years have been concerned to keep young people from smoking, from starting the habit.

Q Well, let's talk --

A And if I may, sir, you asked me about the Florida textbooks using the Surgeon General's report. I believe that was 1965.

Q Well, we'll get to that.

A Oh, okay. I'm sorry. I thought I --

Q Yeah, sure.

A I was confused.

Q Oh, no, no. I'm -- we're going to go over what was taught.

Now -- but my question was --

A Sir, I'm sorry. I don't know this textbook. Could you tell me what grade it was used in?

Q Yeah -- no, I don't know what grade it is. Can you tell?

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A I'd have to see the textbook to know.

Q Yeah. Well, take it look at it. It says, You're Growing Up.

A I can't read it. I'm sorry. Does it say in the text what year it's used in?

Q No, it doesn't say it. Does it matter?

A I'd like to find out as much about it as I can. I do not know this textbook and I'm trying to understand it.

Q Well, why does it matter whether it's used in the third grade, the fourth grade, the fifth grade, or the sixth grade, or the seventh grade, what difference?

A It helps us understand what the education of children was.

Q Well, all right. So that's what we're

trying to find out is what they were taught. Does it make it any difference whether they were taught in the third grade or the fifth grade?

A It might. It depends upon what it was.

Q Well, this is what it was: Some doctors and research workers think that smoking is fairly harmless to most healthy adults who smoke moderately.

My question to you is, is this the kind -- is this typical of what was being taught to kids?

A The next sentence certainly is.

Q Well, I didn't say the next sentence.

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Isn't the whole thing being taught to them? You want to just take that one sentence out?

A Well, I don't want to eliminate it.

Q Well, I'm not eliminating it either, Doctor, I'm asking you -- that thing is going to drive me crazy if I don't find it. Ah, I've got it.

I'm asking you whether this whole paragraph, the first paragraph that they're talking about in response to the question, the answer is the whole paragraph: Doctors are still not in complete agreement as to the full extent of harm. Some doctors and research workers think that smoking is

fairly harmless, but all authorities agree that smoking is harmful to growing boys and girls.

Now, this is my whole question: Not just the -- not last one, but is the whole thing the message that in general was being taught to kids?

A Some kids, yes. That entire paragraph is typical of some textbooks from that period.

Q Just some?

A Yes, sir.

Q So you've looked at them all and have a count of how many have words like that?

A I'm sorry. I'll try and be more precise.

It's typical of some of the textbooks that I have looked at, yes, sir. I can't speak for all

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of the textbooks.

Q Okay. Let's go up to 1963. Modern Health, James Otto, Julian -- and the publisher is Holf, Reinhart and Winston. Famous publishers, right?

A A national firm, yes.

Q A national firm does all sorts of school books, don't they?

A I don't know how many school books they do, no.

Q How many did you look through?

A I looked through the ones in the state of Florida that I was able to get ahold of.

Q Over here on page 167, Smoking and Cancer: No one has ever proved that irritation from smoking causes cancer of the lung. And then it goes on to say, but the following figures are from medical records, think them over. 95 percent of the victims of lung cancer are heavy smokers. One half of one percent are nonsmokers. There has been an increase in an attempt to discover the reasons. Numerous experiments are in rats and mice and cancer of the tongue.

So let's talk about the whole thing, including what is named -- what is listed first. Is this the message that kids are getting?

A In that year, that's correct.

Q Just in that year?

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A Well, that's what's in front of us.

Q Well, I mean, books are not just used for one year, right?

A Sometimes they were changed from year to year. Sometimes they lasted for several years.

Q All right. And without getting into detail about this particular book, isn't it fair to say that this was the message that people were

getting: No one has proved it, but that there is some evidence that it's true? Fair?

A I'm sorry?

Q Is that fair? Typical? Is it typical?

A It is typical for that period, yes, sir.

Q All right. And just briefly, here is a few more arguments the nonsmokers could have added: That smoking is expensive, it's a messy habit, it not only fouls the breath but it stains the teeth as well. If you're a heavy smoker and find yourself in a place where you can't smoke you get fidgety.

The best argument the smoker gave was, I enjoy it. Most of the other arguments were only excuses. Weigh all of the evidence before you decide to start smoking. If you do smoke, be a moderate smoker.

Is that typical? Were kids being told, oh, well, if you do smoke, just be a moderate smoker?

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A Do you want to read the rest of that paragraph?

Q Sure.

You will reduce the bad effects on your lungs and digestion and perhaps add years to your life. The teenager especially should consider the

tobacco problem carefully before deciding to smoke. It's very easy to decide not to smoke. Having started, it becomes increasingly difficult to stop or even to cut down if one has become a heavy smoker.

That's what they were being told?

A Yes, sir, apparently. Do you remember what grade that's from? As I recall, the Otto textbooks were used in several grades.

Q Well, you'll have to decide that for yourself, I guess, or on cross or on redirect.

That was typical, though, right?

A Yes, sir. It was.

Q Okay. And I'm almost done.

Do you remember you talked about something -- well, let me ask you first: You talked about some hearings that happened in front of Congress, do you remember? They were the 1957 hearings. And you said you knew about them, right?

A Yes, sir.

Q And then you were asked about the 1965 hearings, and you said you weren't so sure -- or did

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you say you knew about them? I can't remember.

A Well, as I recall, I was confused as to whether it was the -- you said it was the '66 law of

the hearings held in '65; is that correct?

Q Well, is it?

A And these are the hearings -- are these the hearings to which you referred?

Q Yeah. Are you familiar with them?

A I have seen them, yes.

Q Okay. So you've looked through -- and there are some -- probably a thousand pages of hearings that went on in Congress, right, in '65?

A Yes, sir.

Q And the tobacco industry brought their witnesses to testify that cigarettes don't cause cancer, true?

A Oh, yes.

Q And, let me see. Also, do you remember a statement by the American School Health Association?

A No, sir, I do not.

Q Okay. On page 111 near the top of the page, the American School Association testified, the practice of the endorsement of tobacco and smoking by outstanding athletes in public media advertising with its obvious connotations regarding health and physical fitness undoubtedly affects the attitudes and behavior or impressionable school age youth. Do

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you see that?

A I do now, sir.

Q Do you agree with it?

A No, sir.

Q They were wrong?

A Well, perhaps I should restate it. I don't know that this individual is wrong. I don't know who it is. But what I meant, in responding, was that whatever the impact may or may not have been, the knowledge in the public that smoking was hazardous to your health was widespread and continuous.

Q Okay.

(Change of reporter, 10:50 a.m.)

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Q Okay. Are you familiar with the statements by Dr. Thomas Carlisle, chairman of the Committee on Tobacco and Cancer, the American Cancer Society, past president of the American Cancer Society?

A No, sir.

Q Okay. Let me see if I get that right.

MR. RILEY: Your Honor, may we get the textbook from Mr. Wilner to take a look at while he's continuing his questioning?

MR. WILNER: Sure.

THE COURT: All right.

Q Okay. Now, this testimony before Congress was part of the historical record, right? You cited to it.

A Yes, sir, it would be part of it.

Q Okay.

A But as I said at that time, and I think it's useful to clarify, that I would be interested primarily in how the results of this hearing or comments in that hearing became part of public -- of the record available to the public --

Q Okay. Let's --

A -- ordinary people, consumers.

Q Let me see if I have it. This is

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Dr. Carlisle, the past president of the American Cancer Society.

This brings to me the first point that I feel is of vital importance. The evidence that has developed since 1948 establishes beyond reasonable doubt the fact that cigarettes are a threat to our nation's health. However, over the years, a skillful campaign has sought to blur the evidence with a smoky cloud of confusion.

Each new piece of research, each new summary of evidence has been attacked with what seems to be the intent of planting doubt, of leaving the individual free to smoke on the grounds that scientists could not agree.

Do you agree with Dr. Carlisle's observation of the public record at the time that there was a smoky cloud of confusion?

A Well, sir, I think I'd rather side with Dr. John Heller in the 1957 hearings who took an opposite view.

Q So this is -- was up to 1965. And would you disagree with Dr. Carlisle?

A Yes, sir. Again, I would simply cite Dr. Heller years earlier who found the public record to be quite clear.

Q Now, in 1965, the arguments were made by the cigarette industry not to enact any legislation that required a warning label on the package; did

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you know that?

A Yes, sir.

Q And you're aware of the statement of Bowman Gray, when Bowman Gray got up in front of Congress and said, basically, we do not want the warning label?

A His statement was quoted in a number of newspapers, yes, sir.

Q Okay. And do you -- did -- do you assume that Bowman Gray, who was the CEO of R. J. Reynolds Tobacco Company and was speaking for the entire industry, was acting in the self-interest of the industry when he made that statement?

A I can't analyze him. I would imagine that he was representing his industry, yes.

Q Okay. And they opposed the imposition of the warning label in front of Congress?

A Yes, sir.

Q And let me ask you this then: Sometimes what people do or what people say can be used as evidence by a historian of what the facts were at the time, right?

A Yes, sir.

Q Okay. So Mr. Gray --

MR. RILEY: May I, Your Honor?

THE COURT: Sure.

Q Mr. Gray said, Opposed warnings -- and

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that was in the interest of the industry -- here's my question. Let me see if I can frame it right.

If, in fact, as you say, everybody already knew, then why would the industry have been opposed, since, if everybody already knew, a warning wouldn't have hurt sales? Why would they be opposed?

A Sir, we don't know that or I don't know that. How do we know that a warning would or would not have at that time?

Q If everyone already knew, then would a warning have hurt sales?

A We don't know.

Q Well, let's use logic then. If everyone already knew that -- for a warning to hurt sales, it must have been telling somebody something that they didn't already know, right?

A No, sir --

Q Well, why would it hurt sales?

A -- not necessarily.

Q Why would it hurt sales unless it was

conveying something that was not already known?

A I don't know that it would or would not. How would I know that putting a warning on would or would not hurt sales until the warning was put on? And even then, I wouldn't know unless I could prove that that was a direct relationship to it.

Q But don't you think that Mr. Gray, in all probability, was concerned about sales?

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MR. RILEY: Your Honor, calls for speculation.

THE COURT: I'll sustain the objection.

Q What was the industry concerned about?

A I would imagine about their profits.

Q Exactly. So if they opposed the warning, doesn't logic tell us that they thought the warnings would hurt their profits?

A Sir, not necessarily. You are -- as a historian, the first thing we teach our students is not to make that kind of leap of logic unless we have evidence to prove it. There may have been other motives to their behavior, I don't know.

Q You don't know?

A No, sir.

Q You do not assume that they acted in their economic self-interest?

A I can assume that without knowing necessarily what the motives of an individual was in that conversation -- in that testimony to which you refer.

Q Acting in their own economic self-interest, they opposed the warnings, true?

A Yes, sir.

Q Why?

A Because they thought it wasn't in their interest.

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Q Why?

A Sir, there may have -- you're asking me to speculate.

Q Okay. I have one last question. Do you sometimes --

MR. WILNER: Here's what I need.

(Counsel conferred with cocounsel)

Q All right. As we get to that, let me show you something else. Now, sometimes we learn about an event that happened before, it happened earlier, by something that's published later, right?

A Yes, sir.

Q I mean, people can, in later times, refer back to things that happened earlier, and that's part of historical record, right?

A It could be, yes, sir. You mean their reference back?

Q Sure.

A Yes, sir.

Q And then -- remember, you said you didn't look at any internal Brown & Williamson documents, but there were some that were mentioned in the public press, right? You said that yesterday, didn't you?

A Yes, sir.

Q So out of the notes from your group, let's see if we can look at July 7th, 1981, talking about an event that occurred in 1969. It says in 1969,

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the FTC formally urged Congress to toughen health warnings printed on cigarette packs. The same year, Brown & Williamson Tobacco Corp. spelled out a strategy that countered the mounting evidence and publicity on the hazards of smoking.

Doubt is our product, since it is the best means of competing with the body of fact that exists in the minds of the general public. It is also the means of establishing a controversy -- controversy.

The tobacco company's memo is part of documents subpoenaed by the FTC in 1979 and sealed for two years under a Court order Knight-Ridder News

obtained portions of the sealed documents.

Did you know about that?

A Yes, sir.

Q Did you know that that was in a 1969 document from inside Brown & Williamson?

A It's reported in 1981, yes, sir.

Q Did you ask to see it?

A The "it" is the document?

Q Sure.

A No, sir. I read it in 1981.

Q Sometimes the flavor of the times is captured in photographs; is that true?

A I don't know what you mean by "the flavor of the times."

Q "Flavor" is not a word that historians

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mean -- or use?

A No, sir. I just don't know what you mean by it.

Q What people were thinking about a given subject, like cigarettes. Isn't it sometimes captured in photographs?

A It might be, yes.

Q So looking at this from 1958, looking at this "Life" magazine advertisement of people -- not so easy to see -- sitting around a Christmas tree

smoking Lucky Strikes. Was that a typical scene from the households in the 1950s?

A That is an advertisement?

Q Yes.

A It's a typical advertisement. I would say -- I haven't studied advertising.

Q Does it reflect a typical scene in the households of America in the 1950s?

A I would say, sir, it reflects a rather ideal scene sort of the way -- thinking of the man, the way I like to think I used to look.

Q Okay. So let me hand you this document -- or this picture which has been marked in evidence.

THE COURT: As what?

MR. WILNER: I'll need help.

THE COURT: Well --

MR. WILNER: He'll get it.

MR. MATTHEWS: I've got it.

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MR. WILNER: 22.

MR. LANGLEY: 8 through 22, part of the group.

MR. MATTHEWS: It's 13.

MR. WILNER: All right. Let me have the small one, if you would. Thank you.

Q So this is No. 13 of a family sitting

around the Christmas tree handing Lucky Strike -- take a look at it, and tell me if you think this was America in the 1950s.

A Well, it's an idealized picture, I would say. It shows people in an ideal, happy situation, made to see them -- enjoying themselves, children giving their father cigarettes.

Q And when you say it's "ideal," what do you mean it's ideal?

A Could be an individual family. I don't know.

Q Yeah.

A Could be another family.

Q Could be something from an ad, even, couldn't it?

A I don't know.

Q I mean, you used the word that it was an ideal; is it typical?

A It doesn't strike me as an ad from it's picture but, again, I'm not an expert in ads. It

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doesn't have the gloss of an ad, certainly not the ones you just showed us.

Q So what do you mean by ideal? That was my question. What is ideal about it?

A It captures people in a moment different

from other moments in their lives.

Q Is it --

A With a smile on their face and looking at it, you associate with their pleasure.

Q And is this what people were doing in the 1950s?

A By "this," you mean giving cigarettes to one another at Christmas?

Q Typical.

A I have no idea whether it's typical or not, sir.

MR. WILNER: Thank you, Doctor. That's all I have.

Oh, and before I leave, we'd like to mark this table as the next number for identification. That was the one he talked about.

THE COURT: For identification.

MR. WILNER: Yeah.

(Plaintiff's Exhibit No. D was marked for identification.)

MR. MATTHEWS: May we approach the side bar.

(Side-bar conference outside the hearing

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of the jury)

MR. MATTHEWS: Your Honor, I want to put

on the record that, obviously, we had some discussion and disagreement about the reading of CD's comments and quotes. And I don't want to, in front of the jury, do anything that would go counter to Your Honor's ruling.

But we wanted to be clear. As I understand it, Your Honor has ruled that we are not permitted to go into any further of CD's quotes. That being the case, we would like to, for the record, proffer that we intended to offer to the doctor documents --

THE COURT: I don't have a problem with you putting all of his notes in there. I like the ones you wanted to ask questions about, but not into evidence but as a --

MR. MATTHEWS: Proffered as an exhibit.

THE COURT: As an identification.

MR. MATTHEWS: That's all I want to do.

THE COURT: So it will be made part of the record. I'm going to ask that they step back for five minutes.

Ladies and gentlemen, if you'll step back in the jury room for about five minutes, we'll get right back to the question.

(Jury exits courtroom; side-bar conference

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resumed, jury absent)

MR. MATTHEWS: I just wanted to be clear on the record.

THE COURT: Let me make sure of something else. You know, obviously, I'm not going to allow you to go into the parts that they didn't talk about, about the quotes, but you will be allowed to ask questions, if you choose, about the quotes that he did ask about.

MR. RILEY: I appreciate that.

THE COURT: But, you know, if you spend too much time on that, it may open the door for all of them.

MR. MATTHEWS: I just want to make sure you don't have any objection to us attaching Tulchin's -- those summaries and notes as exhibits. I don't want to have to question him about it.

MR. RILEY: Marking for identification, no.

THE COURT: I think the record's clear that those were notes that he produced for y'all at the deposition from his file. And if, you know, you show it to Mr. Riley just to make sure that he knows which portions you highlighted and, you know, I want it to be part of the record. I thought you were

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going to do that.

MR. MATTHEWS: I just wanted --

MR. WILNER: I'd like to do it afterwards. It's too cumbersome to do it here.

THE COURT: I don't have a problem with that. You can -- look, it's my understanding that you can mark for identification anything you want and at any time you want, and you really don't even need my permission to do it. But I wanted the record to be clear on this.

MR. MATTHEWS: And the only reason I question now, Judge -- I apologize. I know I'm holding you up -- but I just wanted to be clear that you were ruling we couldn't go into any of the others because I don't want to stand here and have to ask each one of those in front of the jury.

THE COURT: I think it's pretty clear on the record that I prevented you from eliciting any more testimony from CD.

MR. MATTHEWS: I didn't want to have to spend 20 minutes asking about each one.

THE COURT: All right. We'll take a short break and I'll be right back.

(Discussion off record and recess)

(Jury enters courtroom)

THE WITNESS: Do you want to return these?

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MR. RILEY: You can leave them. May I, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. RILEY:

Q Doctor, I know it's been a long day and a half or so, so we'll wrap this up quickly.

You were shown some documents from the Hill and Knowlton collection by Mr. Wilner on cross-examination; do you recall that?

A Yes, sir.

Q And had you ever seen those documents before?

A No, sir, I had not.

Q You've never had -- never had a chance to review them in any comprehensive way, have you?

A No, sir.

Q And Mr. Wilner read you some parts of those documents?

A Yes, sir.

Q I'd like to show you a couple other parts of those documents.

MR. RILEY: And this is tab No. 18, Your

Honor. And I'm not sure of the exhibit number, but it's the Hill and Knowlton binder.

THE COURT: Well, I need to know for the record which one it is.

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MR. WILNER: I can never remember.

THE COURT: What's it about?

MR. RILEY: Hill and Knowlton documents.

MR. LANGLEY: That's number 28, Your Honor.

MR. NYHAN: Tab 8, I believe.

THE COURT: All right.

Q I'd like to call your attention -- the date on this document is April 28th, 1955. I'd like to call your attention to paragraph one.

The cigarette health issue is still considered top news. This is often more apparent at a local level than in national news. While there is a growing tendency to emphasize the uncertainties and disputes on the issue, the end result is to keep the controversy constantly alive.

And would you please explain whether that's consistent with your reading of the historical record and what that means?

A Well, certainly, it's consistent with my research in the published press that there was a

constant, frequent appearance of news and of opinion pieces concerning the links between smoking and health.

More, it's an interesting aside, by referring to keeping the controversy alive, it indicates the comparison between the ongoing assurance of common knowledge and the controversy

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among scientists concerning one disease or advances in one disease or another.

Q And is it correct that this was -- the issue was top news in the 1950s?

A Yes, sir, it was.

Q I'd also like to read paragraph three to you. It says, Antitobacco crusaders continue to ride the health issue. Our clippings show continual and local activities by the American Temperance Society, the Seventh Day Adventists and similar groups scheduling lectures and movies dealing with the cigarette and health issue.

Dr. Ochsner and Dr. Wynder continue to be the leading antitobacco crusaders of stature in the medical and scientific world.

Would you please explain to the jury what activities, in your review of the historical record, what activities you found that occurred on the local

level and their impact on common knowledge?

A Right. The activities at the local level would include things like, with reference to Seventh Day Adventists, it would include stop-smoking clinic. The Seventh Day Adventists came up with a five day smoking plan which was adopted by hospitals in Miami and elsewhere in Florida in and around the country as early as the 1950s. And we refer to that when mentioning them.

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The American Temperance Society, of course, we've spoken about already. They were opposed to drink as well as to smoking. And they have been constant in their local activities. That would include things of daily life.

I mean, these are the people -- these are our neighbors who organize associations or chapters -- I'm sorry. I was searching for the word -- chapters of the society. And they would have acted through things like bake sales. They would have had PTA meetings. There would have been things to which friends and neighbors would have met to discuss this and other things.

Q And what was the effect of activities on a local level, activities like that on common knowledge, Doctor?

A Well, it reinforces it. There's where you acquire your common knowledge. There's where people talk to people and hear about what their neighbors say and what their neighbors are doing and where they're getting information.

So those would be the kind of things to focus on to get a sense of how -- whether, I should say, common knowledge is changing for example on this issue and whether public awareness is going through an evolution of some kind.

Q And, Dr. Tulchin, is this further evidence that the health risks of cigarette smoking were

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common knowledge in the 1950s?

A Yes, sir. It's the closest we have to confirmation of how information gets to people at the local level. We're never 100-percent certain who reads the "New York Times" or the "Miami Herald."

Q Let me read you another -- from another document, and this is dated July 9th, 1959, Doctor. And it's tab 29 of the same exhibit.

And this document says, The basic problem is essentially the same: Charges that tobacco use, particularly cigarette smoking, is a major health hazard, especially as a causative factor in lung

cancer.

And please explain whether this is consistent with your reading of the historical records, Doctor.

A Yes, it is.

Q Why?

A Well, it records that, in their opinion, I assume it means the basic problem, as far as they're concerned. This is another Hill and Knowlton document, I'm sorry?

Q Yes.

A So they would be concerned about getting their message out and they're having trouble doing it because they're running up against a bedrock of

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understanding about the dangers of cigarette smoking. In their opinion, they're not convincing people that cigarettes are not a major health hazard.

Q Doctor, this says that charges were a major health hazard. And were those charges widely publicized back in 1959 when this memorandum was written?

A Yes, sir.

Q And were they common knowledge?

A They were.

Q And let me read you another -- this is from the same document. This is from page four. On the bottom it says, Of course, the fact remains that the antagonists are far from silent, far from ineffective and far from inactive.

Despite a more favorable industry position, the problem is still weighted on the side of the cigarette attackers.

And I guess the attackers means the people who were conducting smoking and health research?

A And particularly those that were trying to get people to stop smoking, people trying to ban smoking, restrict smoking and those, as you indicated, in the scientific community talking about the health hazards.

Q And is this an indication that the balance of the press coverage is weighted on the side of the

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scientific researchers?

A Certainly, at that point, it's their opinion.

Q Is that consistent with your review and your review of the historical records?

A It is my opinion as well, yes, sir.

Q Now Mr. Wilner asked you some questions about whether consumers were provided statistical

information about the extent of the risks of smoking. And do you know whether consumers were given that information back in the 1950s?

A When you're referring to statistical information, you're concerning -- with reference to?

Q Scientific data showing the extent of the relationship between smoking and health.

A That data appeared in news articles. It certainly would be part of, for example, the temperance movement meetings and things of that nature.

MR. RILEY: Your Honor, may I have a moment?

THE COURT: Yes.

(Counsel conferred with cocounsel)

Q Doctor, I've got a blowup of an article that appeared in "Time" magazine. It's dated June 17th, 1957. And can you please just tell us what

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this says and whether information like this was communicated to consumers in the 1950s?

A Yeah, a graph like that would appear -- that would have been in a column in "Time" magazine, and it would have been included there. This is one, obviously, that we used earlier. And it quotes

Cuyler Hammond and Daniel Horn, who were "...able to go far beyond the findings they had earlier reported. They concluded that all smoking shortens life, cigarettes smoking is, by far, the worst offender, and the risks go up with the amount smoked."

And -- there you go. "Death rates from all causes combined are 68 percent higher for cigarette smokers than for nonsmokers. The rates rise with the number of cigarettes smoked daily." I like that phrase because --

Q Which phrase?

A The last I just read: "The rates rise with the number of cigarettes smoked daily," because it's one that's repeated historically over and over again. The more you smoke, the worse it is and that's easy for someone who's not a statistician to understand.

"Even after a man has been a heavy cigarette smoker for many years, he can still reduce his risks of premature death by kicking the habit, declared Hammond and Horn."

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Q And did statistical data like this appear in the popular press and in the national media as well in the 1950s and '60s?

A Yes, sir, it did.
Q Now, you were asked some questions about movie stars; do you recall those questions?
A Some of them, yes.
Q Did the fact that people smoked in movies mean that information about smoking and health was not getting to the public?
A No, sir, not in my opinion.
Q Even though people smoked in movies, was there publicity in the public media about smoking and health?
A Yes, sir.
Q Even though movie stars smoked, were cigarettes still called cancer sticks and coffin nails?
A Yes, sir, they were.
Q Did people still understand those terms and what they meant?
A Yes, sir.
Q And did consumers in the 1940s and '50s and '60s know what those terms meant?
A I believe they did.
Q Even though movie stars smoked?
A Yes, sir.
Q And even though there were advertisements

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for cigarette ads in magazines like "Life" and in other magazines, did consumers still get the word that smoking was dangerous to health?

A They had it and they got it.

Q And was that information still common knowledge even though cigarette advertisements appeared in magazines and in papers?

A Yes, sir.

Q And even though there were cigarette advertisements that appeared in magazines and newspapers, did consumers still understand the terms cancer sticks and coffin nails?

A Yes, sir.

Q And was it still common knowledge that smoking was related to health problems?

A Yes, sir.

Q Including, specifically, lung cancer?

A Yes, sir.

Q Now, you were asked questions about press coverage of statements by the TIRC; do you recall being asked those questions?

A I do.

Q And in the course of your research you, in fact, found statements by the TIRC in the newspapers and in magazines, right?

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A I did.
Q Did you find references to the TIRC in the popular media from the time, from the 1950s?
A Yes, sir.
Q And did you also find in the same media reports linking smoking to health?
A Of course.
Q And in the same media, did you find reports that smoking was a cause of lung cancer and a cause of heart disease?
A I did.
Q And other illnesses?
A I did.
Q Did all of the stories that appeared in the popular press discuss the TIRC or contain statements by the TIRC?
A No, sir.
Q Even though there may have been statements by the TIRC that appeared in the press, was the public still aware of the relationship between smoking and health in the 1950s and '60s?
A Yes, sir. In my opinion, the public was.
Q And why do you believe that?
A Because of the variety of sources of information that indicate that ordinary people were

well aware of the dangers of smoking. Press and

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many articles to which you refer would be one, but not the only one.

Q And did those same stories report on the relationship between smoking and lung cancer in particular?

A In particular in the 1950s, of which you refer.

Q And even though there may have been statements by the TIRC that appeared in the press in the 1950s, was it still common knowledge that smoking was associated with lung cancer?

A Yes, sir, it was.

Q And how do you know that?

A From the many articles during that same period stressing the link, emphasizing the link and from the use of slang terms that come into common practice at that time. We've got a new one -- cancer sticks.

Q That term arose in the 1950s?

A Yes, sir. It came into common usage. It may have come a few years earlier.

Q And did the press carry stories and reports, like the Hammond and Horn study?

MR. WILNER: Object; this is repetitive.

THE COURT: I'll sustain the objection, Mr. Riley. I believe you went into that on direct.

Q Even though there may have been stories in

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the press that talked about the TIRC, were the stories -- was there widespread publicity given to reports linking smoking and cancers?

MR. WILNER: Object; repetitive.

THE COURT: I'll let him answer that one.

A Would you restate the question, Mr. Riley please? I'm sorry.

Q Okay. Even though there may have been references to the TIRC in the popular press, was the link between smoking and lung cancer still widely reported?

A Yes, sir, it was, in all the media.

Q And were those reports common knowledge?

A The information in them confirmed common knowledge, would be the way I would prefer it.

Q Did you -- you said "confirms"?

A There is information, for example, about a brand new scientific study. The new data information would not necessarily be common knowledge.

What was common knowledge was the understanding of the relationship between danger to

your health and smoking. This would be confirmatory. This would be confirming common knowledge.

Q And was that the effect of the press coverage in the 1950s?

A Yes, sir.

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MR. RILEY: May I have a moment, Your Honor?

THE COURT: All right.

(Counsel conferred with cocounsel)

MR. RILEY: I have no further questions, Your Honor.

MR. WILNER: Your Honor, I just have one.

THE COURT: All right.

MR. WILNER: I need help finding it. I don't think 29 --

MR. MATTHEWS: I think it was 8.

MR. WILNER: I was trying to find the last one you put up from Hill. I think the index -- he said it was 29, but that's not it. It's not 29. I just want to get the same one. I couldn't see the date.

MR. RILEY: 24.

MR. WILNER: 24. Okay. Thank you. Thank you.

RECROSS-EXAMINATION

BY MR. RILEY:

Q Okay. So this is my question. 24. Okay. Here. I'm sorry, it took me a second to find it.

This is what you were shown, and this is really my only question -- oops. Over here, it says, The basic problem is -- the basic problem is

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essentially the same. And this comes from the TIRC, right? It comes from Hill and Knowlton, who worked for the TIRC? That was your understanding when you were shown this document on your redirect, right?

A Yes, sir.

Q The basic problem is essentially the same. Charges that tobacco use, particularly cigarette smoking, is a major health hazard, especially as a positive factor in lung cancer.

Here's my question: If everybody knew, why was this a problem?

A Why the charges were a problem?

Q Why were they a problem?

A I can only speculate, I'm sorry. I mean, I don't know why Hill and Knowlton think those charges represent a problem to them.

Q You have no idea?

A I can speculate, if you wish.

Q No. I'm just talking about using ordinary logic. Have anything to do with sales?

A Sir, from that evidence, which I have not seen before today, I can speculate on what might be the evidence of it. I do not know, certainly, what that document states -- what it means, excuse me.

Q Rather than to anything specific in this document, why was it a problem for the cigarette industry that people said that cigarettes cause cancer?

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A That's the problem I'm having, sir. That's what I'm trying to explain. I don't know what their thinking is on that. I can't -- I don't have any information that tells me.

I can speculate; I can imagine and suppose, but I -- you know, that wouldn't be a very good way for a historian to go about it.

Q As a historian, was it a problem?

A Was what a problem?

Q The fact that people were saying that cigarettes cause cancer. Was that a problem for the industry?

A I don't think it's a problem. Do you think the industry did?

Q Did they?

A According to this document.

MR. WILNER: Thank you.

THE COURT: May Dr. Tulchin be excused?

MR. RILEY: Yes, Your Honor.

THE COURT: Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Thank you, I appreciate it. You're free to go.

(Side bar, Court and counsel)

THE COURT: Call your next witness, please.

MR. NYHAN: Thank you, Your Honor. We

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want to move this right along. We call Lance Reynolds.

THE COURT: Come up and have a seat, please, sir. I'll swear you once you're seated.

Raise your right hand, please, sir. Do you swear the testimony you're about to give will be be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Thank you, sir. Mr. Nyhan.

MR. NYHAN: Thank you, Your Honor.

THE WITNESS: Excuse me. Before we get

started, can I get some water?

MR. NYHAN: By all means. I'll even give you a fresh cup.

THE COURT: If you need to, reach over and refill it any time.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Mr. Nyhan?

LANCE REYNOLDS,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. NYHAN:

Q You're retired, Mr. Reynolds?

A That's right.

Q When and from where?

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A In 1991 from Brown & Williamson Tobacco Company.

Q Would you tell us where you now live?

A In San Carlos, California, which is just 25 miles south of San Francisco.

Q You have a family?

A Yes.

Q Grandchildren?

A Yes.

Q How many?

A Three.

Q Where did you grow up?

A I grew up just south of London in England. I was born in 1939, just before the outbreak of World War II in England.

Q Did you go to high school in England?

A Yes, I did.

Q And did you go to college?

A Yes. In 1957, I was lucky enough to get a scholarship to Oxford University. I went there in 1958 and was there until 1962.

Q So you started in '58?

A Yes.

Q And completed in '62?

A That's correct.

Q Then what did you do?

A Well, what I'd done in college was study

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chemistry, and I got a job as a chemist in the cold, industrial northeast part of England, working for a company that made the stuff that goes in white paints. And we were trying to make white paint whiter.

Q How long did you stay in the cold, industrial northeast?

A Well, for a couple of years, until I got a job in the warmer south. Although I should point out that the south of England is still pretty chilly compared with Jacksonville.

Q What was the name of that company?

A That was Imperial Tobacco Company of Great Britain.

Q And what kind of work did you do there?

A I worked on developing some new cigarette filters, understanding how cigarette filters worked, and also how carbon monoxide, which is one of the constituents of tobacco smoke moves through the cigarette when you're smoking it.

Q What do you mean how it moves through the cigarette?

A Well, we had a machine that we could measure how much was coming out on each puff and we're trying to understand how much was produced in the beginning of the puff and --

Q Can you slow it down a bit. You had a machine?

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A Right.

Q This is a machine that was developed to measure cigarette smoke?

A Well, to measure some of the constituents

in cigarette smoke. This machine would measure carbon monoxide and carbon dioxide.

(Change of reporter, 11:38 a.m.)

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Q And what period of time were you doing that work?

A This was between 1964 and 1966.

Q And did you move on from that position to another job?

A Yes. In 1965 the Imperial Tobacco Company sent me on a business trip over here to a conference, talked about this work I was --

Q Over here from England to the United States?

A Yes. And I traveled around a number of the southern states, Carolina, Virginia, and I really liked it over here, and so as soon as I got back from England, I thought I'd try and find a job over here in the USA.

Q Were you successful?

A A year later I was, although not in the South. I first went to New Jersey; although, the company that was headquartered in New Jersey also had a branch down in North Carolina, which was really where I wanted to be and where I was transferred to about six months later.

Q And what was the name of that company that you first worked with here in the United States?

A It is called Celanese.

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Q What did you do for them?

A Well, they were one of the makers of the material that goes into cigarette filters, so they were -- we were trying to understand how to make it more effective.

This company was also working on a substitute for tobacco, because people were having a great deal of difficulty finding anything you could do to tobacco not to produce tar or much less tar. The idea was if you could make some kind of synthetic material which you could burn in the cigarette that wasn't producing tar, this would be less hazardous.

Q This was back in the time frame 1966 to 1968?

A That's correct.

Q And what type of tobacco substitutes were being investigated by the Celanese Company then?

A Well, they had their own formulation. They gave it the name Citrelle, and it was mostly made from chalk and some kind of binder to stick the chalk together.

Q Where was the interest coming from in exploring alternates to tobacco?

A Well, they -- by 1965 the first Surgeon

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General's report had come out. The suppliers to the tobacco industry were people that supplied cigarette paper and cigarette filters -- were trying to help the tobacco companies meet the questions raised about smoking and health, so that was one way it came.

In England the company I used to work for was working with another chemical company over there called Imperial Chemical Industries, and they were developing a tobacco substitute that they called NSM, a new smoking material.

Q Were they successful in developing those products?

A Well, the products were developed, and they were put into some cigarettes in England as a test, and the cigarettes weren't successful in the test market.

Q The consumers didn't buy them?

A Not very often, no -- well, not repeatedly.

Q Now, how long did you work with the Celanese Corporation?

A Until the end of 1967.

Q Then what did you do?

A Well, in the fall of 1967, a friend of

mine that was traveling to the United States told me that the Brown & Williamson Tobacco Company was

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looking for someone to go and work for them in their R and D department, and was I interested. And although I was very happy living in North Carolina, I was young and ambitious and asked for some more money and got another job then with Brown & Williamson.

Q And Brown & Williamson is located in Louisville, Kentucky?

A That is right.

Q What position were you first hired in as?

A Well, as a research chemist with the understanding that if I was okay, I would then be a group leader, so I'd have a little group of people to work on the problems.

Q What was the initial assignment, the initial area in which you worked when you started with Brown & Williamson?

A To make a much more effective cigarette filter. It finally got to the point where if you stuffed any more filter material into them, they got too hard to suck through, and so there needed to be some new breakthrough, a different kind of filter.

Q Could you slow down a moment and just

explain what you mean. The filter is composed of what?

A Well, it is made of a lot of little fibers, just like the synthetic fibers that we use

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to make fabrics, same kind of material.

Q And if you -- you mentioned that if you stuffed too much in it, it becomes hard to draw on it?

A That's right.

Q How does that occur?

A Well, it is kind of common sense; the more you stuff into something, the harder it would be to suck through it. It is going to take out more smoke, but there will come a time when the person that is trying to puff on the cigarette will say, can't puff on it. It is too hard.

Q That was your first area of responsibility; is that right?

A That's right.

Q And why was the company interested in developing, improving its filters at that time?

A Well, the health authorities were saying very clearly smoking is bad for people, but they were also saying that if you're not going to give up, don't smoke as many cigarettes. And if you do

smoke, smoke lower tar cigarettes.

Q Were the tobacco companies making any claims to the public about health benefits of smoking filtered cigarettes?

A No.

Q Well, where was this information coming from?

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A Well, people like Dr. Wynder who was at the Sloane Kettering Cancer Memorial Center. I think that is what the Surgeon General was saying. I'm not sure, but I think that is what he was saying.

Q During the course of your work at Brown & Williamson, you received a promotion to group leader?

A Yes.

Q What did your responsibilities entail in that position?

A Well, in addition to me working on trying to make this special kind of filter, I had someone who was trying to make a filter to take some irritants out of the smoke, to make cigarette smoke less scratchy and irritating. There were people who were specializing in trying to make new kinds of cigarette papers. My responsibilities kind of grew

over time.

Q Did you later become the director of product development?

A Yes, that was in about 1982.

Q And how long did you hold that position?

A Until 1987.

Q How many people did you supervise when you were director of product development?

A Around 50 to 70.

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Q Could you describe the responsibilities of those people who reported to you at that time.

A Well, the product development department was one half of R and D. R and D is research and development, so I had the development half. And we were responsible for like the recipes that make all Brown & Williamson's cigarettes. So whether it's a Kool or a Viceroy or a Barclay or Belair or a Raleigh, we determined the kind of tobacco that would go into it, the kind of cigarette paper it would have, the kind of filters they would have, the kind of flavors they would have. So every product that Brown & Williamson made we determined what it would be made from.

Q Now, you mentioned some of the brands. What are the major brands that Brown & Williamson

Tobacco Corporation makes today?

A I'm going to have to break it into two parts, because when I was working for Brown & Williamson, I'll say those because they are the same, Kool, Viceroy, Raleigh, Belair, GPC, which is the value price cigarette, Barclay, which is very successful in the United States, and a cigarette called Capri, which is very, very slim cigarette. If you have ever seen it, it looks real skinny like a very small soda straw. So those are the Brown & Williamson brands.

After I retired, Brown & Williamson merged

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with the American Tobacco Company at the end of 1994, and their brands include cigarettes like Pall Mall or Lucky Strike, Carlton, Misty, Tarreyton, and there are probably some others, but those are the major kinds of brand names.

Q Now, you have told us about the brands. Companies made different styles within brands; is that true?

A Yes.

Q And what was the purpose of offering different styles within a brand?

A Well, to try and get as many sales for that brand name as you could. And the first thing

that happened, and I guess this was around the early '60s, began to be the extra length cigarettes so -- as well as our Viceroy king size. There would be a Viceroy 100 millimeter or a Kool king size, Kool 100 millimeter.

The next move on that was to have a lower tar version, so there might be a Marlboro and the Marlboro Lights.

Q Now, Marlboros aren't made by Brown & Williamson or American Tobacco Company, right?

A No, correct.

And then there would be a Marlboro Lights 100. So from one name, you now have four kinds of cigarettes, the king size, the 100s, and the Lights

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versions of each.

Q What effect did this dividing the market into smaller and smaller slices have on competition?

A Well, competition was very fierce in the cigarette industry. It made it harder and harder.

Q Now, you remained as a director of product development from 1982 to 1986; is that right?

A Either the end of '86 or early '87, yes, sir.

Q What position did you next take?

A Well, I then became the director of

research. As I said earlier, in the R and D department there is a research half and a development half. I'd been the D half for four or five years, and then I switched jobs with the guy that was the director of research. He became the director of product development, and I became the director of research.

Q All right. What were your responsibilities when you became director of research?

A Well, the research department's job is to understand as best you can what is in tobacco, what is in smoke, how smoke is formed from tobacco, to support the product development group in its efforts to improve current products or to devise new ones. Within that group, too, at least in Brown & Williamson, was where the responsibility for

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watching over the safety of anything we might be adding to the cigarettes was regarded and keeping on top of the smoking and health literature.

Q You referred to devise new products. Why was the company coming out with new products?

A Well, to try and sell more cigarettes.

Q To meet the competition from the other companies?

A Or to -- well, to beat the competition as opposed to meet it, preferably.

Q Can you tell us the difference between the research function in the department and the product development function in the department?

A Well, the -- as I said, the product development function is responsible for all the cigarette recipes and to help the factories and make sure they make them right and to improve the taste of a product. If we think, for example, that consumers are saying Newport tastes better than Kool, then we want to see if we can do something to Kool to improve its taste.

Q That's the work done by the product development department?

A Yes.

Q All right.

A Now, the research department would be trying to help the product development department in

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part do that. And just to pursue this Newport and Kool discussion a bit further, it would be the research department that would be taking Newport apart, trying to find out what kind of tobacco is in Newport, what kind of flavors they might be adding to Newport. So the research group would be

providing some fundamental information in that instance to product development. They might also be providing some fundamental information to the company in general.

Q How many people reported to you when you served as director of research?

A It varied, but of the order of 50 to 75.

Q And then how many people total in the research and development department at the time you retired in 1991?

A Probably about 150.

Q Now, since you have retired, have you been working?

A Well, some, not nearly as much as I used to.

Q You consult?

A Yes.

Q With whom do you consult?

A Mostly for Brown & Williamson. And for the -- about the first four years or even five years after I retired was almost entirely for the R and D department. My contract was with the R and D

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department, and the kinds of things I would do would be to set up a training program for product development people or go to one of the factories and

help them improve the quality of whatever they were doing or help them analyze some data, because I'd been around a long time. I was a kind of jack of all trades, and I could do a lot of things like that.

Q So after you retired then you engaged in specific consulting assignments that were consistent with the work you had done over the years for the company; is that right?

A That's right.

Q And you have a consulting agreement with the R and D department?

A Yes.

Q What does that provide for in terms of compensation?

A That changed in about 1996. A headhunter approached me and said would I be interested in going back to work for another tobacco company, and I said, yes. And I called up Brown & Williamson and said this other company is interested in having me go to work for them, but I'd prefer to say retired, but I would like a better contract. So I renegotiated the contract two years ago, and that provides for $75,000 a year for 60 days work a year.

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25 Q And that's the contract under which you

1 are now working?
2 A Yes.
3 Q Do you consult for other companies as
4 well?
5 A A little bit, yes.
6 Q Who are they?
7 A Well, over the years I have done some work
8 for Seimen's Nuclear Fuel, who made nuclear fuel,c
9 where I was living at the time in Washington State,
10 and they wanted some help analyzing the data they
11 were collecting on radioactivity in their factory,
12 making the nuclear fuel. I did that.
13 I was doing volunteer work for the
14 Washington State Quality Award Foundation, which
15 gives out quality awards like the National Malcolm
16 Baldridge Quality Award. It was a company here in
17 Jacksonville, Merrill Lynch Credit Corporation, that
18 won this national quality award. That was here.
19 They were giving a talk on it in San Francisco a
20 couple of weeks ago. So I do work in that quality
21 area and help companies prepare applications for
22 quality awards.
23 Recently, realizing, perhaps hoping this
24 tobacco stuff is not going to go on forever, I've
25 started learning how to do a new thing. There is an

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international quality standard called ISO 9000, and I've learned how to do audits on that, and recently I did some internal auditing for a company out in the bay area in that.

Q Let me ask you about scientific societies to which you belong. Can you tell us about them?

A Well, I have been a chemist all my life, so I belong to the English Chemical Society, which is called the Royal Society Of Chemistry. I'm interested in aerosols because smoke, cigarette smoke is an aerosol, which is like a cloud is or fog is. And there is an American Association for aerosol research, so I belong to that, and I go to their meetings.

And there is a society called the American Advancement in the Association of Science, which helps you keep up in sort of general what is going on in the world of science, so those are the three scientific societies I belong to.

Q Have you been awarded any patents?

A About six, but I have to admit that none of them are actually being used to make money for anyone.

Q What type of products were they?

A They were on cigarette filters.

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Q And have you published articles on tobacco-related topics?

A Again, about half a dozen articles.

Q Where have they been published?

A Mostly in a journal called Tobacco Science.

Q And who are the readers of Tobacco Science?

A Well, people working in tobacco companies, plus their suppliers, plus the -- I believe the people that work on smoking and health issues in organizations like the American Health Foundation.

MR. NYHAN: Your Honor, if this would be an appropriate time for the Court --

THE COURT: That's fine. If you'd approach the side bar a minute. We don't need the court reporter.

(Side-bar conference, Court and counsel)

THE COURT: Ladies and gentlemen, we are going to break for lunch at this point and ask you to be back in the jury room at one o'clock. Take an hour for lunch.

THE BAILIFF: The Court is in recess until one o'clock.

(Proceedings recessed at 12:05; resume at 1:00)

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